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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, the National Association of Regulatory Utility Commissioners, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 20, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals, which has not yet been generally reported,[1] appears at Appendix A to this petition.[2] The First Report and Order of the Federal Com-

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[1] However, excerpts of the opinion appear at 43 U.S.L.W. 2341 (February 18, 1975).

[2] The appendices are separately bound in a companion volume, hereinafter cited as "Pet. App."

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munications Commission (FCC), which is reported at 29 F.C.C. 2d 870 (1971), appears at Appendix C, and its Memorandum Opinion and Order denying reconsideration, reported at 31 F.C.C. 2d 1106 (1971), appears at Appendix D.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 20, 1975. A timely petition for rehearing was denied on March 12, 1975, by an order which appears at Appendix B, and this petition for certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1970).

QUESTIONS PRESENTED

1. Whether the FCC exceeded its authority under the Communications Act by promulgating, on the basis of a rulemaking proceeding, a "free entry" policy for new applicants seeking to provide specialized common carrier services to the public.

2. Whether an FCC decision may be sustained as rational, when the FCC has subsequently instituted an investigation of basic issues which were raised in the subject decision but were rejected by the FCC as being without merit.

3. Whether a Court of Appeals may permit the FCC to ignore the National Environmental Policy Act (NEPA), on grounds of timeliness of raising the issue that arguably may have been initially justified, when the Court's decision on review is not issued until two years after oral argument on the appeal, and at that time the FCC still had made no move to comply with the law.[3]

[3] In the event certiorari is granted, petitioner may also present the related issue for a ruling, namely, whether the FCC's failure to comply with NEPA should have been excused by the Court of Appeals had there been no extended delay in rendering its decision.

STATUTORY PROVISIONS INVOLVED

1. Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.* (1970).

2. National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* (1970).

3. Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (1970).

Relevant sections of the statutes are set out in Appendices E through G, respectively.

STATEMENT OF THE CASE

In this case the NARUC challenges a major policy decision of the Federal Communications Commission establishing a general rule favoring the unlimited or "free" entry of new entities seeking to provide domestic private line communications common carrier services to the public.

Background. For many years, common carrier telecommunications services have been provided to the American people through chosen instruments regulated by Federal and State regulatory agencies. The Congress created the FCC in 1934 to regulate interstate carrier telecommunications services, and its counterparts at the State level — members of the NARUC[4] — were established by their respective legislatures to regulate intrastate carrier services.

[4] The NARUC is "the national organization of State commissions" charged with the economic and safety regulation of utilities and carriers, as referred to by Congress in 49 U.S.C. §§ 302(b)(2), 305(f) and 1673(a)(1) (1970) and 47 U.S.C. § 410(c) (1970, Supp. III). A substantial portion of the opinion of the Court of Appeals is devoted to establishing the proposition that NARUC and its members have standing to mount the instant challenge to the FCC's decision. (Pet. App. 2a-18a). This portion of the Court's opinion is clearly correct, and review is not sought of that issue herein.

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Insofar as pertinent here, there are three basic types of interstate carrier telecommunications services: Message Toll Telephone Service (MTS), Wide Area Telephone Service (WATS) and Private Line Service (PLS).[5] MTS is ordinary long distance telephone service, wherein a subscriber may be connected on demand with any other telephone anywhere in the nation. The charges for such service are fixed on a per message basis and reflect both the distance and the length of time of the call. In turn, rates are determined by averaging costs, so that they are the same for equidistant pairs of points, regardless of the actual costs of providing the service along a given route.

WATS enables a subscriber to be connected on demand with any other telephone in a specified geographical area (such as a State or one or more area codes), for essentially a fixed charge per month. PLS (also known popularly as "tie-lines" and "leased" or "dedicated" lines) provides a subscriber with an open circuit between two or more specific telephones or switchboards for essentially a fixed charge per month.

As can be seen, WATS and PLS are designed to meet the needs of large telecommunications users, and may be viewed as "volume discount" alternatives to MTS. Stated another way, the ordinary consumer is confined, as a practical matter, to MTS to meet his telecommunications needs, because he does not generate the volume required to make WATS and PLS discounts meaningful.

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[5] Each of these services is also offered on an intrastate basis, subject to NARUC members' jurisdiction, with essentially similar rate and service characteristics. In addition, however, NARUC members regulate local exchange telephone service, which has no counterpart at the interstate level.

By the same token, the intercity telephone industry plant used to provide MTS, WATS and PLS is substantially fungible.[6]

The dominant entity providing domestic intercity telecommunications services is, of course, American Telephone & Telegraph Company (AT&T). Through its Long Lines Department and the facilities of its operating telephone company subsidiaries (popularly referred to collectively as the "Bell System"), it may be fairly said that AT&T provides and operates the overwhelming majority of all MTS, WATS and PLS facilities available in America. Independent, non-Bell telephone companies provide such services within their respective service areas; however, in almost all cases the services are provided jointly with the Bell System, with Bell providing the intercity transmission facilities and acting as the primary manager.

In addition, Western Union Telegraph Company provides PLS for non-voice (*i.e.*, record or data) applications, as an incident to its public telegraph service. For purposes of the decision below, the FCC characterized Western Union's operations as "modest" compared with those of AT&T. (Pet. App. 119a).

After World War II, technological advances made it possible to employ microwave radio frequencies in long haul communications transmission. This development called into play the FCC's function as manager of the frequency spectrum under Title III of the Communications Act, 47 U.S.C. § 301 *et seq.* (1970), in addition to its traditional common carrier regulatory function under Title II of the Act, 47 U.S.C. § 201 *et seq.* (1970).

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[6] The major difference among the three services in this regard is that PLS circuits essentially bypass the switching apparatus of the telephone company that is used to complete circuits on demand for individual calls in MTS and WATS.

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This development, and to a lesser extent other comparable innovations, has enabled AT&T to achieve marked economies of scale in the cost of intercity communications transmission in recent years. By consolidating the demand for MTS, WATS and PLS, and by furnishing such services through jointly-used facilities, AT&T has been able to introduce higher capacity, lower unit cost facilities into service than otherwise would have been possible. In turn, the users of each class of service have benefited from the stable or declining interstate rates that have resulted from technological cost reductions offsetting operating cost increases.

The benefits of these technological cost reductions have also been shared with users of local exchange and intrastate telephone service, regulated by NARUC members, through periodic modification of the process known as jurisdictional separations.[7] Under Section 221(c) of the Communications Act, 47 U.S.C. § 221(c) (1970), the FCC has the authority to allocate (*i.e.*, "separate") telephone company investment in plant in service between interstate and intrastate jurisdictions for ratemaking purposes.

The technological cost savings achieved in recent years at the interstate level have made it feasible, from a practical standpoint, to increase from time to time the relative proportion of telephone plant that is allocated to interstate jurisdiction, thereby more equitably reflecting the role of local exchange telephone facilities in the origination and termination of interstate calls. In 1972, Mr. Dean Burch, then Chairman of the FCC, estimated that the separations changes made since 1952 cumulated approximately $1

[7] The process of jurisdictional separations has previously been considered by this Court. *Smith* v. *Illinois Bell Telephone Co.*, 282 U.S. 133, 75 L.Ed. 255, 51 S.Ct. 65 (1930).

billion annually in revenue requirements that had been transferred from intrastate to interstate jurisdictions.[8]

Stated another way, users of local exchange and intrastate telephone services regulated by NARUC members pay approximately $1 billion *less* each year for such services as a direct consequence of microwave and other cost-saving technological innovations achieved in long haul communications transmission systems in recent years.

Until 1969, the FCC had not passed upon the issue of authorizing additional domestic communications common carrier transmission systems in the United States.[9] In that year, by a 4-3 decision, the FCC approved the application of Microwave Communications, Inc. (MCI) to establish a limited common carrier private line service utilizing point-to-point microwave technology along the high-density Chicago-St. Louis route. *Microwave Communications, Inc.*, 18 F.C.C. 2d 953 (1969), *reconsideration denied*, 21 F.C.C. 2d 190 (1970). In granting the application, the FCC believed that MCI's services would meet the specialized interoffice and interplant communications needs of small businesses. *See, e.g.*, 18 F.C.C. 2d at 953.[10]

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[8] *Hearings before the Subcommittee on Communications of the Committee on Commerce, United States Senate, on Overview of the Federal Communications Commission*, 92d Cong., 2d Sess., Serial No. 92-54, p. 80 (1972).

[9] However, the FCC earlier had allocated microwave bands to large private users for the purpose of building microwave communications systems on an individual or shared-use basis to satisfy internal communications needs. *Allocation of Microwave Frequencies Above 890 Mc*, 27 F.C.C. 359 (1959), *affirmed and modified on reconsideration, Allocation of Frequencies in Bands Above 890 Mc*, 29 F.C.C. 825 (1960).

[10] Hence, MCI and the subsequently authorized similar entities became known as *specialized* common carriers, a reference that will sometimes be used hereinafter.

This decision provoked a vigorous dissent by Chairman Rosel Hyde, a 23-year veteran of the FCC, who pointed out:

> The decision of the majority is diametrically opposed to sound economics and regulatory principles. It likewise is designed to cost the average American ratepayer money to the immediate benefit of a few with special interests.
>
> The decision would authorize the use of a microwave frequency in one of the most critical bands for the benefit of at most 204 private line customers, according to the applicant's own marketing consultants. The same frequency could ordinarily be used to derive thousands of circuits, predominantly used for the benefit of the ordinary long distance message toll user. There has been no showing here of ". . . reasonable expectation that competition may have some beneficial effect" *(FCC v. RCA Communications, Inc., . . .).*
>
> Why does the majority condone this obviously grossly inefficient use of the spectrum. Because, they say, of the low cost and "flexibility" of the facilities proposed by applicants. It should be noted that the so-called "flexibility" cited by the majority is here, as it was in the TELPAK case, a mere euphemism connoting lower rates. But how is it that applicant is able to propose lower rates than the existing common carriers for private line service? For no other reason than that it is proposing a typical "cream skimming" operation. Thus, it has selected a major route, Chicago to St. Louis, with heavy traffic density characteristics and the concomitant lower unit costs. The existing common carriers, on the other hand have been encouraged by the Commission, primarily for social reasons, to base their rates both for message toll

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and private line services on nationwide average costs. Thus the small user in the hinterlands is afforded the same rates as the large users in the major cities. The evidence in this record tends to show, and there is no basis in our experience to believe otherwise that AT&T and Western Union could offer lower rates for private line service between Chicago and St. Louis than those proposed by MCI, were they to base such rates on their costs for that route alone.

The chances are, and the record so indicates, that AT&T and Western Union will be constrained to lower their private line rates to meet the competition of MCI. This, however, means that other users, either the small private line users who are not so fortunate as to live in large cities, or message toll users, or both, will have to make up the difference if total revenue requirements are to be met. This is in addition to the higher costs which are bound to fall on all communications users by virtue of the inefficient use of the frequency at stake.

The effect of the majority decision is to destroy the principles of nationwide average rate making . . . . This entire case is a classic example of an inefficient, uneconomic misallocation of resources.

. . . In short, what we have is a grant of valuable spectrum space, with no adequate factual basis to warrant such an authorization. I am compelled to say, based upon this record, that the majority has acted not upon considered judgment of the evidence but rather, as in the RCA case, simply upon a reflex judgment that competition, particularly to AT&T, is *per se* good. The action,

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> because it is unsupported by the facts of record, is inconsistent with the statutory standard. 18 F.C.C. 2d at 971-973.[11]

Proceedings Before the FCC Below. Encouraged by MCI's success, numerous parties filed applications with the FCC seeking similar common carrier authorizations. As of July 17, 1970, there were 1,713 pending applications for microwave stations (Pet. App. 50a).[12] Accordingly, the FCC issued a *Notice of Inquiry to Formulate Policy, Notice of Proposed Rule Making, and Order*, 24 F.C.C. 2d 318 (1970), to resolve certain basic policy and procedural questions, which the FCC believed to be common to all of the applications, prior to consideration of the individual applications.

Insofar as pertinent here, the Notice posed the following issues for consideration in the proceeding:

> A. Whether as a general policy the public interest would be served by permitting the entry of new carriers in the specialized communications field, and if so,
>
> B. Whether comparative hearings on the various claims of economic mutual exclusivity among the applicants are necessary or desirable in the circumstances. (Pet. App. 62a-63a).

The discussion of Issue A in the Notice was posed as a "staff analysis" on which the FCC took no position pending consideration of comments by interested persons. (Pet.

[11] To the same effect were dissents by Commissioners Robert E. Lee and James J. Wadsworth. *See*, 18 F.C.C. 2d at 974.

[12] A number of applications were submitted by affiliated interests. Thus, for example, the FCC pointed out that as of March 15, 1971, there were 33 applicants, of which 17 were MCI affiliated, making 46 separate proposals and seeking a total of 1,877 microwave stations. (Pet. App. 50a).

App. 63a). The staff analysis concluded that a general policy in favor of new entry would serve the public interest because in the staff's view, competition appeared to be "reasonably feasible" and could be expected to have some beneficial effects "without adverse impact on service by established carriers." *(Id.)* Issue B was a Commission proposal, contingent upon the adoption of the staff position on Issue A and subject to modification in light of the FCC's resolution of that issue. *(Id.)* The FCC proposed *not* to hold comparative hearings unless a "much stronger" showing was made and it was persuaded that the public interest required such action in the particular situation. *(Id.)*

Approximately 200 parties participated in the proceeding (Pet. App. 64a), although as a generalization the most substantive submissions were those of the much more limited number of parties directly affected, *i.e.*, for the most part the applicants and the established carriers. Oral argument before the FCC *en banc* was heard on January 21-22, 1971, and rebuttal comments to oral argument were received. (Pet. App. 64a).

In its decision (Pet. App. 48a-188a), the FCC not suprisingly concluded that its staff analysis was correct, and that a "free entry" policy should be promulgated for the specialized common carriers. Consistent with this view, the FCC also declined to hold comparative hearings on the pending applications.

Petitions for reconsideration filed by the NARUC and the Washington Utilities and Transportation Commission (WUTC) were summarily rejected by the FCC. (Pet. App. 189a-194a).

Proceedings Subsequent to FCC Decision. Review of the decision was sought by the WUTC and the NARUC in the United States Court of Appeals for the Ninth Circuit. Initial and reply briefs were filed under dates of May 5.

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1972, and September 22, 1972, respectively, and oral argument was held on February 15, 1973. The NARUC argued that the "free entry" policy promulgated by the FCC is inconsistent with the "public interest, convenience and necessity" standard of the Communications Act, 47 U.S.C. §§ 214, 309 (1970). In particular, the NARUC strenuously charged that the FCC had failed to adequately consider or investigate the impact of its decision on the rates paid by users for intrastate telephone service. (*See*, Pet. App. 27a). The NARUC also assigned as error the FCC's complete failure to consider the environmental impact of the policy adopted by the order, as required by the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* (1970).[13] (Pet. App. 39a).

More than a year after oral argument was held before the Court, but well prior to entry of its decision, the FCC launched a broad-ranging investigation, *inter alia*, of the impact of its specialized common carrier policy decision on local telephone service rates.[14] Heading the list of specific issues to be considered in the investigation is whether ". . . under present ground rules, competition from specialized common carriers (SCC's) has resulted or will result in the imposition upon the public of . . . [h]igher rates for residential telephone service."[15]

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[13] The NARUC had not previously raised this issue before the FCC itself.

[14] *In the Matter of Economic Implications and Interrelationships Arising From Policies and Practices Relating to Customer Interconnection, Jurisdictional Separations and Rate-Structures*, Docket No. 20003, Notice of Inquiry, 46 F.C.C. 2d 214 (1974). The Court was first advised of this development by the NARUC by Consolidated Answer to Motion and Cross-Motion for Leave to File Copies of Commission Decision filed under date of May 8, 1974.

[15] *Id.*, First Supplemental Notice, 50 F.C.C. 2d 574, 576 (1974).

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Moreover, shortly prior to issuance of the Court's decision, the FCC promulgated rules to implement NEPA in proceedings before it.[16] In pertinent part, the FCC declared that NEPA applies to rulemaking proceedings[17] (which it previously had denied in this case to the Court), and that the construction of common carrier microwave relay antenna towers or supporting structures exceeding 100 feet in height ". . . are considered to be major on the basis of their probable environmental significance. . . ."[18]

Nevertheless, the Court of Appeals affirmed the FCC's decision. (Pet. App. 18a-42a). The Court held that the case law permits the FCC wide discretion in its proceedings, and that the FCC's decision was an exercise of such discretion. (*See, generally,* Pet. App. 25a-39a). The Court also held that the FCC's discussion in its decision pertaining to economic impact on local telephone users "is adequate" (Pet. App. 27a), but the Court neither acknowledged nor discussed the FCC's economic impact investigation pending in Docket No. 20003. Finally, the Court recognized that the FCC could not discharge its responsibilities under NEPA by strictly relying upon private parties to raise environmental claims (Pet. App. 39a-40a), but the Court

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[16] *In the Matter of Implementation of the National Environmental Policy Act of 1969,* Docket No. 19555, Report and Order, 49 F.C.C. 2d 1313 (1974). It should be pointed out that it took the FCC *five full years* after NEPA became effective to issue these rules.

[17] *Id.*, 49 F.C.C. at 1368 (Rule 1.1303). This requirement is codified at 47 C.F.R. § 1.1303, 39 Fed. Reg. 43835, 43844 (December 19, 1974).

[18] *Id.*, 49 F.C.C. at 1317, referencing Rule 1.1305. In turn, Rule 1.1305(a)(2), codified at 47 C.F.R. § 1.1305(a)(2), 39 Fed. Reg. 43835, 43844 (December 19, 1974), specifically identifies the construction of microwave towers as major actions within the meaning of NEPA. The FCC is giving further consideration to the difference in height considered to be major for microwave towers vis-a-vis other types of towers. Order, *In the Matter of Implementation of the National Environmental Policy Act of 1969,* 50 F.C.C. 2d 814 (1975).

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nevertheless concluded that ". . . the balance should be struck against possible review and reversal of this Commission order on the ground NARUC seeks to raise for the first time in this court." (Pet. App. 40a-41a).

In its Petition for Rehearing to the Court (Pet. App. 216a-229a), the NARUC laid particular emphasis on the extent to which the pending economic impact investigation and the FCC's environmental rules vitiated the Court's stated legal basis for affirming the FCC's decision.

However, the NARUC's petition was summarily denied. (Pet. App. 47a).

REASONS FOR GRANTING THE WRIT

By itself, the FCC's decision to fundamentally alter the structure by which communications services are delivered to the American people raises important issues of public policy which warrant plenary review by this Court. The policy adopted, and the aftermath of its implementation, in terms of changing communications rate structures, industry profile and its practices, unquestionably will affect every American who utilizes telephone service.

Specifically, however, the FCC's decision to promulgate a "free entry" policy for specialized common carriers conflicts with this Court's recent determination in *FPC v. Texaco, Inc.*, 417 U.S. 380 (1974), that an administrative agency charged with regulating public utilities may not defer to the market place as the measure of its statutorily mandated decisional standard. Moreover, the failure of the Court of Appeals to acknowledge or discuss the FCC's subsequently initiated economic impact investigation squarely raises the issue of whether, in testing the adequacy of an agency decision, a reviewing court must blind itself to subsequent agency action that is fundamentally inconsistent with its posture before the court in the decision under

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review. This issue is an important question of administrative law which is likely to recur, and which requires guidance by this Court.

Finally, sanction by the Court of Appeals of the FCC's complete failure — over more than a two-year period — to comply with the requirements of NEPA so far departs from an acceptable course of judicial review that this Court's exercise of its supervisory powers is warranted.

I. THE FCC'S "FREE ENTRY" POLICY FOR SPECIALIZED COMMON CARRIERS CONFLICTS WITH THIS COURT'S DETERMINATION IN *FPC V. TEXACO, INC.*, 417 U.S. 380 (1974), THAT A REGULATORY AGENCY MAY NOT DEFER TO THE MARKET PLACE AS THE MEASURE OF A STATUTORILY MANDATED DECISIONAL STANDARD.

Fundamentally at issue in this case is whether a regulatory statute enacted by Congress, *i.e.*, the Communications Act, imposes any practicable limits on the discretion to be exercised by the FCC in licensing domestic communications common carrier systems to provide services to the public in competition with the services of existing carriers, principally American Telephone & Telegraph Company (AT&T).

In *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 97 L.Ed. 1470, 73 S.Ct. 998 (1952), upon which the Court of Appeals principally relied, this Court recognized that competition is a relevant factor in making statutory public interest determinations under the Communications Act, although the specific holding in that case is that a presumed national policy in favor of competition is insufficient in law to sustain grant of additional common carrier authorizations. 346 U.S. at 95, 97 L.Ed. at 1478.

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Other cases have also affirmed the proposition that an administrative agency has discretion in making statutorily-mandated determinations.

However, there are clearly also countervailing propositions which have been recognized by this Court. As Mr. Justice Douglas cogently observed:

> Expert discretion is the lifeblood of the administrative process, but "unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion."[19]

Similarly, Chief Justice Warren has pointed out that an administrative agency ". . . is entirely a creature of Congress and the determinative question is not what the [agency] thinks it should do but what Congress has said it can do."[20]

Recently, in *FPC v. Texaco, Inc.*, 417 U.S. 380, 41 L.Ed. 2d 141, 94 S.Ct. 2315 (1974), this Court set aside an FPC order exempting small producers of natural gas from direct rate regulation. Although the specific ruling was that the order was too ambiguous to be sustained, the Court went on to say:

> For the purposes of the proceedings that may occur on remand, we should also stress that *in our view the prevailing price in the market place cannot be the final measure of "just and reasonable"*

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[19] *Burlington Truck Lines v. United States*, 371 U.S. 156, 167, 9 L.Ed. 2d 207, 215, 83 S.Ct. 239 (1962), quoting *New York v. United States*, 342 U.S. 882, 884, 96 L.Ed. 662, 663, 72 S.Ct. 152 (1951) (Dissenting opinion). Emphasis in original.

[20] *CAB v. Delta Air Lines*, 367 U.S. 316, 322, 6 L.Ed. 2d 869, 874, 81 S.Ct. 1611 (1961).

> *rates mandated by the Act.* It is abundantly clear from the history of the Act and from the events that prompted its adoption that Congress considered that the natural gas industry was heavily concentrated and the monopolistic forces were distorting the market price for natural gas. Hence, the necessity for regulation . . . .[21]

The Court further stated:

> In concluding that the Commission lacks the authority to place exclusive reliance on market prices, we bow to our perception of legislative intent. It may be, some economists have persuasively argued, that the assumptions of the 1930's about the competitive structure of the natural gas industry, if true then, are no longer true today. It may also be that control of prices in this industry, in a time of shortage, if such there be, is counterproductive to the interests of the consumer in increasing the production of natural gas. *It is not the Court's role, however, to overturn congressional assumptions embedded into the framework of regulation established by the Act. This is a proper task for the legislature where the public interest may be considered from the multi-faceted points of view of the representational process.*[22]

As did the FPC in *Texaco*, the FCC held a rulemaking to implement its policy. As did the FPC in *Texaco*, the FCC here produced an elaborate rationale to support its policy decision. But the bottom line in both cases is that the FCC and FPC determined that the "congressional assumptions

[21] 417 U.S. at 397-398, 41 L.Ed. 2d at 156. Emphasis added. Footnote omitted.

[22] 417 U.S. at 400, 41 L.Ed. 2d at 157-158. Emphasis added. Footnote omitted.

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embedded into the framework of regulation established by the Act" were no longer appropriate, if they ever were.

Accordingly, the FCC, as did the FPC, determined that the market place should be the measure of additional entry into communications common carriage, rather than the regulated entry mandated by Congress.

The latter proposition can be demonstrated briefly. After making generalized findings relating to need for new entry on a nationwide basis, and collateral matters, the FCC concluded:

> . . . [I]f an applicant is found qualified, obtains the necessary financial backing, and makes a business judgment to risk that investment in competition with such of the pending applicants as may be authorized, we are not inclined to place further obstacles in its path. Moreover, since new entry by more than one private line applicant appears reasonably feasible in a potential market of this nature, *we deem the marketplace to be a more reliable and effective instrument than the comparative hearing process for determining how many and which new entrants may succeed.* (Pet. App. 159a-160a. Emphasis added).

These, then, are the standards by which the FCC authorized and will continue to authorize new specialized common carriers under the "public interest" standard of the Act: (1) whether the applicant is "qualified,"[23] (2) whether the applicant makes the "business judgment" to

[23] The NARUC is aware of no FCC requirements for entities to be "qualified," other than that they must make a minimal showing of capability to provide the proposed service (which must be done in any event by an unregulated businessman in order to get financial backing), and that they not contravene the provisions of the Act relating to alien

(continued)

enter the business, and (3) whether the applicant can get financial backing. Clearly, such standards in practice are nothing more than required of any businessman entering a completely unregulated activity. As such, they constitute deferral to the market place in conflict with this Court's ruling in *FPC v. Texaco, Inc., supra.*

II. THE EXTENT TO WHICH A REVIEWING COURT SHOULD CONSIDER SUBSEQUENT INCONSISTENT AGENCY ACTION IS AN IMPORTANT QUESTION OF ADMINISTRATIVE LAW WHICH IS LIKELY TO BE RECURRING, AND WHICH REQUIRES GUIDANCE BY THIS COURT.

A second reason for granting the writ here requested is that this case calls into question the scope of factors which a reviewing court should properly consider in assessing the rationality, and therefore the lawfulness, of an agency decision. More specifically, this case raises the issue of whether a reviewing court must blind itself to subsequent agency action that is fundamentally inconsistent with its posture before the court in the decision under review. In discharging their function as the primary reviewers of agency action, Courts of Appeals are likely to face this question

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(continued)

control and similar matters. 47 U.S.C. § 310 (1970, Supp. III). Although the Court of Appeals laid some stress on the fact that this decision did not act on the merits of individual applications (Pet. App. 29a), in practice the applications have been granted subsequent to this decision as essentially a ministerial function. *See, e.g., MCI Carriers,* 27 F.C.C. 2d 380 (1971); 32 F.C.C. 2d 36 (1971); 35 F.C.C. 2d 98 (1972); 37 F.C.C. 2d 1120 (1972) (four notations); *Nebraska Consolidated Communications Corporation,* 35 F.C.C. 2d 991 (1972) (notation); *Southern Pacific Communications Company,* 37 F.C.C. 2d 245 (1972); *Western Tele-Communications, Inc.,* 35 F.C.C. 2d 991 (1972) (notation); *CPI Microwave, Inc.,* 37 F.C.C. 2d 1120 (1972) (notation); *Data Transmission Company,* 34 F.C.C. 2d 306 (1972); *United States Transmission Systems,* 48 F.C.C. 2d 859 (1974).

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on a recurring basis, and should have the benefit of this Court's guidance in their deliberations.

From time to time this Court has expanded upon the criteria by which the adequacy of an administrative decision is to be judged under the Administrative Procedure Act, 5 U.S.C. § 706 (1970). See, *e.g.*, *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 91 L.Ed. 1995, 1999, 67 S.Ct. 1575 (1947) (court must judge the propriety of the agency's action solely on the grounds invoked by the agency; and if those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more proper basis); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, 9 L.Ed. 2d 207, 216, 83 S.Ct. 239 (1962) (courts may not accept appellate counsel's post hoc rationalizations for agency action); *NLRB v. Metropolitan L. Ins. Co.*, 380 U.S. 438, 443, 13 L.Ed. 2d 951, 955, 85 S.Ct. 1061 (1965) (when agency exercises discretion it must disclose the basis of its order and give clear indication that it has exercised the discretion with which Congress has empowered it); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, 28 L.Ed. 2d 136, 153, 91 S.Ct. 814 (1971) (court must consider whether the agency decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment).

Administrative agencies necessarily write their opinions (particularly major ones such as here presented) with at least one eye cocked to the Courts of Appeals. Accordingly, the process of ferreting out discrepancies between what is *stated* in an opinion, and what the underlying *realities* are continually becomes more subtle. Under these circumstances, it is appropriate that the criteria employed by the Courts of Appeals to test agency decisions should likewise continually be refined.

This case presents such a refinement. One of the principal assignments of error urged by the NARUC upon the

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Court of Appeals is that the FCC failed to adequately investigate or consider the impact of its decision on the telephone service rates paid by the vast majority of the telephone using public who have no use for the services of the specialized common carriers. (Pet. App. 27a).[24] Although the Court recognized, as NARUC contended, that the FCC has a legal duty to consider such economic impact (Pet. App. 13a), the Court summarily rejected the NARUC's claim that the duty had been insufficiently met by holding that the FCC's treatment of this issue "is adequate." (Pet. App. 27a).

In turn, the bottom line of the portions of the record cited by the Court is the FCC's categorical assertion that ". . . there is no valid basis for NARUC's assumption that such [specialized common carrier] entry will prejudice the users of local telephone services." (31 F.C.C. 2d at 1107-1108, Pet. App. 192a).

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[24] In brief, the impact is two-fold; First, obtaining additional separations modifications becomes infeasible, as a practical matter, because of pressures on AT&T's interstate profits resulting from the PLS competition. (As an example, the NARUC filed a petition with the FCC for additional modifications on December 19, *1973*. On December 17, *1974*, the FCC announced that action on the petition would be indefinitely deferred. Memorandum Opinion and Order, *In the Matter of the Economic Implications and Interrelationships Arising From Policies and Practices Relating to Customer Interconnection, Jurisdictional Separations and Rate-Structures*, 49 F.C.C. 2d 1238, 1241. As noted above (pp. 6 - 7), the changes since 1952 alone reduce the telephone bills of intrastate ratepayers approximately $1 *billion* annually. Thus, the benefits of long haul cost-saving technological innovations would no longer continue to be shared with the local telephone users.

Second, competitive revenue diversion from AT&T, coupled with rate reductions in PLS, brought about by competitive pressures, likely would require rate increases by AT&T in areas and services where no competition exists. See the dissenting opinion of Chairman Rosel Hyde in *Microwave Communications, Inc.*, 18 F.C.C. 2d 953, 971-973, quoted above, pp. 8 - 10. Thus, there can be an economic impact on AT&T's *customers* without necessarily an economic impact on *AT&T*

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However, in making its ruling the Court neither acknowledged nor discussed the fact that on April 10, 1974, *nine months before the Court's ruling*, the FCC had instituted an investigation in its Docket No. 20003 of the very contentions which it previously categorically rejected, and upon which the Court relied in affirming the FCC.[25]

Moreover, the Court summarily denied the NARUC's Petition for Rehearing (Pet. App. 47a), which strongly emphasized the fundamental inconsistency between the FCC's posture before the Court on review of this case, and its having instituted an expensive and burdensome investigation of issues it categorically rejected as having "no valid basis."[26]

The NARUC recognizes that there must be some practical end to litigation and the issues that may be raised on review of an agency decision. But where, as here, the agency acts so diametrically at odds with its posture before the court while the decision is still under review, the reviewing court should be flexible enough to account for that development and act accordingly.

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[25] Notice of Inquiry, *In the Matter of the Economic Implications and Interrelationships Arising From Policies and Practices Relating to Customer Interconnection, Jurisdictional Separations and Rate-Structures*, 46 F.C.C. 2d 214 (1974). The Court was advised by the NARUC of the pendency of the proceeding and its significance as early as May, 1974. See above, p. 12, n. 14.

[26] For a fully documented showing of the FCC's inconsistency, see Part III of the NARUC's Petition for Rehearing. (Pet. App. 220a-224a). The NARUC would especially point out, however, that in instituting the economic impact investigation, the FCC specifically referred to the NARUC's claims of economic impact in this case. Notice of Inquiry, *In the Matter of the Economic Implications and Interrelationships Arising From Policies and Practices Relating to Customer Interconnection, Jurisdictional Separations and Rate-Structures*, 46 F.C.C. 2d 214, 215, quoted at Pet. App. 221a.

III. SANCTION BY THE COURT OF APPEALS OF THE FCC'S FAILURE TO COMPLY WITH NEPA SO FAR DEPARTS FROM AN ACCEPTABLE COURSE OF JUDICIAL REVIEW THAT THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWERS.

Finally, sanction by the Court of Appeals of the FCC's complete failure in this case — over more than a two-year period — to attempt any compliance whatsoever with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321, *et seq.* (1970), so far departs from an acceptable course of judicial review that this Court's exercise of its supervisory powers is warranted.

The proceedings before the FCC were tried on the basis of traditional issues of economic regulation, and it was not until review had been sought in the Court of Appeals that the NARUC understood NEPA's relevance in this case and raised that issue to the Court.[27] In its decision, the Court properly recognized that consideration of the NEPA claims would be within its discretion, even though not presented to the FCC in the first instance, and that NEPA's "lofty purposes" must be weighed heavily in the balance in exercising that discretion. (Pet. App. 40a). Nevertheless, the Court declined review. (Pet. App. 40a-42a).

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[27] Specifically, the NARUC alleged adverse environmental impact resulting from the FCC's decision in the following respects: (1) the marring of the aesthetic environment because of the proliferation of multiple low-capacity transmission systems across the country, with microwave towers constructed every 20-40 miles, rather than a limited number of high capacity systems; and (2) the establishment of an overabundance of less expensive (relative to rural areas) communications facilities in highly populated urban corridors, tending to further concentrate businesses and population in these areas. The NARUC also raised as a matter of concern the possible increase in electromagnetic pollution that could result from a proliferation of systems, compared to a limited number of high capacity systems.

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It may be, had the Court's decision issued without extended delay, that the discretion so exercised might have been sustainable.[28] In this case, however, oral argument on the appeal was not held until six months after the last round of briefs were filed, and the decision did not issue until *two years* thereafter. During the two and one-half years that the FCC was on notice that it had failed to comply with NEPA in this case, it made absolutely no move to rectify that failure. Even assuming the FCC's original omission was inadvertent, its continuing failure to comply with the law cannot be excused.

In its ruling below, the Court noted and relied upon the fact that:

> Before any construction [of microwave towers by specialized common carriers] is authorized, separate hearings must be held on each application. NEPA will be applicable to those proceedings. The FCC must consider "the environmental impact of the proposed action" as a whole, and in full context. It cannot treat each application separately from the others and ignore the total program of which it is a part. (Pet. App. 41a. Footnote omitted).

However, in its Petition for Rehearing, the NARUC advised the Court: (1) that the FCC *had not* held hearings on the individual applications, (2) that the FCC *had already granted* substantially all of the pending applications for specialized common carrier construction permits, and (3) that in granting these applications, the FCC gave *no consideration whatever* to environmental impact, let alone the comprehensive analysis that the Court recognized is legally required. (Pet. App. 225a). Accordingly, the NARUC advised the Court that if it did not review the NEPA issues,

[28] The NARUC specifically reserves this issue in the event certiorari is granted.

the FCC would be permitted to "entirely escape compliance with NEPA in one of the few general proceedings it has conducted which is likely to have a significant impact on the quality of the human environment." (Pet. App. 218a).

Inexplicably, the Court of Appeals refused to take any further action to uphold NEPA's "lofty purposes."

In light of the FCC's new rules for implementing NEPA,[29] there can be little doubt that the environmental impact should have been considered by the FCC. By the express terms of those rules, environmental issues are to be considered, and an environmental impact statement issued, in rulemaking proceedings;[30] and the construction of microwave towers such as here authorized are specifically designated as "major" Federal actions within the meaning of NEPA.[31] (Pet. App. 226a-227a).

The effect of the Court's action, therefore, is to permit a flagrant non-compliance with the law to go unredressed — a result which clearly warrants exercise by this Court of its supervisory powers.

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[29] Report and Order, *In the Matter of Implementation of the National Environmental Policy Act of 1969*. 49 F.C.C. 2d 1313 (1974). The rules became effective with January 20, 1975 — *five full years* after NEPA became effective. The proposed rules were released on August 1, 1972, 36 F.C.C. 2d 108, but the final rules were not released until December 16, 1974. Coincidentally or otherwise, the final rules were not promulgated until substantially all of the pending applications for specialized common carrier construction permits had been granted.

[30] *Id.*, Rule 1.1303.

[31] *Id.*, Rule 1.1305(a)(2).

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CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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June 9, 1975

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1550

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WASHINGTON UTILITIES & TRANSPORTATION COMMISSION, *Petitioner,* vs. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents,* DATA TRANSMISSION CO.; NATIONAL RETAIL MERCHANTS ASSOCIATION; THE BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION; MCI CARRIERS; NEBRASKA CONSOLIDATED COMMUNICATIONS; INTERDATA COMMUNICATIONS; SOUTHERN PACIFIC COMMUNICATIONS COMPANY; WESTERN TELE-COMMUNICATIONS, *Intervenors.*	No. 71-2919
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, *Petitioners,* vs. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents.*	No. 72-1198
	OPINION

[January 20, 1975]

On Petition for Review of an Order of the Federal Communications Commission

Before: BROWNING, WRIGHT, and WALLACE, Circuit Judges.

BROWNING, Circuit Judge:

The Federal Communications Commission authorized Microwave Communications, Inc., to construct a specialized communications

common carrier route between St. Louis and Chicago. Microwave Communications, Inc., 18 F.C.C.2d 953 (1969). As a result, a large number of applications were filed by others interested in providing specialized communications services in competition with the established carriers.[1] The applications raised common questions. The Commission instituted a proceeding to formulate policy and establish rules with respect to these issues. *See* Notice of Inquiry to Formulate Policy, Notice of Proposed Rulemaking, and Order, 24 F.C.C.2d 318 (1970). These petitions seek review of the final order issued as a result of that proceeding. First Report and Order, 29 F.C.C.2d 870 (1971).[2]

The Commission's order reflects two basic determinations. The Commission decided that "a general policy in favor of the entry of new carriers in the specialized communications field would serve the public interest, convenience, and necessity." 29 F.C.C.2d at 920. It also decided that "it is not necessary or desirable in the public interest to hold comparative hearings for the purpose of restricting new entry in any particular area to only one private line applicant." 29 F.C.C.2d at 926.

Petitioners attack both determinations on substantive and procedural grounds resting upon the Federal Communications Act, 47 U.S.C. §§ 214, 309. They also argue that the Commission failed to consider the environmental impact of the policy adopted by the order as required by the National Environmental Policy Act, 42 U.S.C. §§ 4231 et seq.

Respondents respond on the merits, and, in addition, challenge petitioners' standing to seek review of the Commission's order.

We hold that petitioners have standing. We affirm the order.

I.

We have been admonished that "[g]eneralizations about standing to sue are largely worthless as such" *(Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150,

[1]As of March 15, 1971, 33 applicants had submitted 46 separate proposals for the operation of 1877 microwave stations. First Report & Order, 29 F.C.C.2d 870, 871 n.1 (1971).

[2]The Commission's Memorandum Opinion and Order denying petitions for reconsideration is reported at 31 F.C.C.2d 1106 (1971).

151 (1970)), and that the solution to standing "problems is in any event more or less determined by the specific circumstances of individual situations." *United States ex rel. Chapman v. Federal Power Commission*, 345 U.S. 153, 156 (1953). From an examination of the nature of this proceeding, the character and interest of the parties, and the substance of the issues, we conclude that each petitioner is a "proper party to request an adjudication of [the] particular issue[s]" it seeks to raise. *Flast v. Cohen*, 392 U.S. 83, 100 (1968). *See also United States v. Richardson*, ... U.S. ....., ... (1974) (slip at 8); *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972).

Petitioners seek review of final administrative action. The availability of judicial review of administrative decisions is generally thought to serve important public purposes.[3] This premise underlies the rule that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review" *(Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967), and has led to a progressive expansion of the categories of persons who are granted standing to obtain such review. *See, e.g., Arnold Tour, Inc. v. Camp*, 400 U.S. 45 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970); *Association of Data Processing Service Organizations, Inc. v. Camp, supra.*

Congress has expressly authorized review of final orders of the FCC.[4] Thus, "Congress has weighed the need for and value

[3] *See, e.g.*, Tucker, The Metamorphosis of the Standing to Sue Doctrine, 17 N.Y.L. Forum 911, 935-40 (1972).

[4] "The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) or title 47." 28 U.S.C. § 2342(1).

"Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 19A of Title 5." 47 U.S.C. § 402(a).

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702.

"Any party aggrieved by [a final order reviewable under 47 U.S.C. § 402(a)] may, within 60 days after its entry, file a petition to review the order in the court of appeals where venue lies." 28 U.S.C. § 2344.

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of judicial review of a given category of administrative decisions, and has decided it is warranted. Congress having explicitly made that decision, the Court has before it only the implementing, secondary decision as to whether there is reason not to allow the particular plaintiff in question to be one of those who may invoke the review—and the standing rules tend to become more liberal." Scott, *Standing in the Supreme Court—A Functional Analysis,* 86 Harv. L. Rev. 645, 656 (1973).

A.

The Washington Utilities and Transportation Commission (WUTC) is an agency of the State of Washington, charged by law with responsibilities related to issues it seeks to raise. There is substantial authority that such an agency, raising such issues, is a proper plaintiff to obtain review of an administrative order.

WUTC's petition for review alleges that WUTC and the general public of Washington "are aggrieved" by the FCC order because "[e]ffectuation of the Order would serve to increase the burden to intrastate telephone users by reason of the diversion of interstate usage of telephone network facilities to the detriment of telephone users whose rates are regulated by state authorities."

The factual and legal premises for WUTC's assertion of standing are largely conceded. The telephone system is a single, integrated network. The same services and equipment provide both interstate and intrastate services. The rates fixed for these services must be sufficient to allow the utility to recover its expenses and receive a reasonable return on its investment. Since the rates of interstate services are fixed by the federal agency and rates for intrastate services by state agencies, common plant and service costs must be allocated between them. *Smith v. Illinois Bell Telephone Co.,* 282 U.S. 133, 146-49 (1930); *The Minnesota Rate Cases,* 230 U.S. 352, 435 (1913). The allocation reflects the relative use of the common facilities in providing one service or the other. A reduction in interstate service relative to intrastate service would decrease the allocation of the costs of common plant and services to the base for interstate rates, and increase the allocation of these costs to the base for

intrastate rates, thus requiring state regulatory agencies to increase rates for intrastate service.[5]

WUTC contends that by authorizing new carriers to furnish specialized interstate communication services without determining that present carriers are unable to meet the need for this service, and without individualized determination of economic exclusivity, the Commission's order will result in an increase in the number of carriers competing to provide this interstate service and will decrease the usage existing carriers will make of common telephone facilities for the purpose of providing interstate service. This in turn will require allocation to intrastate service of a larger share of the costs of service and equipment used in providing both intrastate and interstate services, and will compel WUTC to raise rates for intrastate service, contrary to the interests of Washington telephone users.

WUTC is invested by statute with broad responsibilities to protect the interests of the people of the State of Washington in matters related to the cost and quality of telephone service. WUTC is required to "[r]egulate in the public interest . . . the rates, services, facilities, and practices of all persons [including telephone companies] engaging within this state in the business of supplying any utility service . . . to the public for compensation . . . ." R.C.W. 80.01.040(3). The interest of the public to be protected under the statute is that of the customers of the regulated utility. *Cole v. Washington Utilities & Transportation Commission*, 79 Wash.2d 302, 306, 485 P.2d 71, 73-74 (1971). WUTC is empowered to fix rates for intrastate telephone service that are "just and reasonable" in order to protect consumers from charges that are "unjust, unreasonable, unjustly discriminatory or unduly preferential," as well as to protect the utilities from charges that are "insufficient to yield reasonable compensation for the service rendered." R.C.W. 80.36.140.

The Supreme Court of Washington has specifically recognized that WUTC has an obligation to protect the interests of tele-

[5]As stated in a recent Senate Report discussing telephone rates, "The determination of the rate base at the Federal level, then, has a strong relation to the rates which are charged at the local level." S. Rep. No. 362, 92d Cong., 1st Sess. (1971), 2 U.S. Code Cong. & Admin. News 1511, 1513.

phone users in separations matters—analogous to those underlying WUTC's petition for review in this case—that come within its intrastate regulatory jurisdiction. In *State ex rel. Pacific Northwest Bell Telephone Co. v. Washington Utilities & Transportation Commission*, 66 Wash.2d 411, 403 P.2d 73 (1965), WUTC, under authority granted by R.C.W. 80.36.160, issued an order relating to the division of revenues derived from the interchange of interstate long distance telephone messages between Pacific Northwest Bell and two independent telephone companies. The determination of the appropriate division of revenues in turn required WUTC to devise a plan for the separation or allocation of costs among the various local and toll telephone services performed by the independent companies. In its opinion affirming the order, the court stated:

> The present proceeding is preliminary to the Commission's principal function, which is to establish rates for telephone service which are found to be fair, just, and reasonable to the user, and sufficient to provide reasonable compensation to the utility for the service rendered. See RCW 80.36.080 and 140.
>
> The Commission, in its order, pointed out that the division of revenues is inextricably related to the rate-making process. Thus the real parties in interest in this case are all the users of telephone service in the state of Washington who will have to pay the rates ultimately established for such service.

66 Wash.2d at 427, 403 P.2d at 84.

In addition to these regulatory functions, two other Washington statutes impose upon WUTC an advocacy role in support of the interests—stated in the broadest terms—of telephone users of the state. WUTC is authorized to participate in administrative and judicial proceedings of the kind involved here, "in which there is at issue the authority, rates or practices for . . . utility services affecting the interests of the state of Washington, its businesses and general public . . . ." R.C.W. 80.01.075.[6] WUTC's

[6]The statute reads:

> The commission shall have the authority as petitioner, intervenor or otherwise to initiate and/or participate in proceedings before federal administrative agencies in which there is at issue the authority,

authority under this statute does not appear to be limited to proceedings relating to intrastate services; it exists whenever the authority, rate, or practice affects the interests of the state, its businesses, or its people. A second Washington statute gives WUTC power to investigate interstate rates and charges for telephone services, and provides, "[w]here any acts in relation thereto take place within this state which, in the opinion of the commission, are excessive or discriminatory, or are levied or laid in violation of the federal communications act . . . ," WUTC can petition the FCC for relief. R.C.W. 80.36.250.

For thirty years or more WUTC and other state utilities commissions have acted on the premise that their duty to protect the interest of the people of their respective states is not discharged simply by accepting the existing allocation of joint costs to intrastate use as a base for determining reasonable intrastate rates. They have actively sought to reduce the allocation of joint costs to the intrastate rate base to the extent consistent with law. Congress and the FCC have long recognized that the state utilities commissions are the appropriate parties to represent their respective states in this effort.[7]

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rates or practices for transportation or utility services affecting the interests of the state of Washington, its businesses and general public, and to do all things necessary in its opinion to present to such federal administrative agencies all facts bearing upon such issues, and to similarly initiate and/or participate in any judicial proceedings relating thereto.

[7]In 1941 the FCC and the National Association of Regulatory Utility Commissioners (NARUC) initiated a cooperative study of procedures for the allocation of joint costs. American Tel. & Tel. Co. and the Associated Bell System Companies, 3 F.C.C.2d 307, 309 (1960). In 1947 the FCC published the NARUC-FCC Separations Manual based on this study. *Id.* at 310. The FCC observed in its 1969 report: "Separations procedures that have been developed through the cooperative efforts of the Commission, the State regulatory agencies through the NARUC, and the telephone industry have long been used by telephone regulatory agencies for ratemaking purposes." 35th Annual Report of the FCC 60 (1969).

In 1969 the FCC ordered a $237 million reduction in interstate rates; at the same time rate increases of $500 million were pending before state regulatory agencies. 117 Cong. Rec. 28906-07 (1971). The reduction in interstate rates was based on the development of new technology, such as microwave transmission and coaxial cables, capable of application pri-

The test currently applied to determine if a private person has standing to seek judicial review of agency action is set forth in *Association of Data Processing Service Organizations, Inc. v. Camp, supra,* 397 U.S. at 152-53. The complainant must allege "that the challenged action has caused him injury in fact, economic or otherwise," and the interest which the complainant seeks to protect must be "arguably within the zone of interests to be protected or regulated by the statute of constitutional guarantee in question." Both parts of the *Data Processing* test are satisfied in this case.[8]

The purposes of the first *Data Processing* requirement—"injury in fact"—are satisfied here because the alleged interference with WUTC's ability to discharge its obligation to protect the interests of Washington telephone users gives specificity and concreteness to the controversy and assures its presentation with adversarial vigor.

The fact that WUTC's alleged injury is not economic in nature and cannot be quantified does not prevent it from satisfying the requirement of "injury in fact." *Data Processing, supra,* 397 U.S.

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marily in interstate communication. *Id.* at 28907 (remarks of Rep. Rooney). The FCC and NARUC cooperated, through a joint board administratively established by the FCC at NARUC's request, in recommending proposed rule changes for jurisdictional separations which, when adopted, resulted in a shift of $126 million in revenue requirements from intrastate to interstate operations. H.R. Rep. No. 429, 92d Cong., 1st Sess. 3 (1971). Congress was fully advised of these developments. The FCC and NARUC then agreed upon legislation for the establishment of a permanent Federal-State Joint Board to deal with separation problems S. Rep. No. 92-362, 2 U.S. Code Cong. & Admin. News, 92d Cong., 1st Sess. 1511, 1513-14 (1971). In enacting the proposed statute Congress recognized, with approval, that the result of allowing representatives of the state commissions to participate would be an increase in the allocation of joint plant and operation costs to interstate use. 117 Cong. Rec. 28906-07.

[8]The Supreme Court has applied this two-part test in cases where there was no specific statutory provision for judicial review, and complainants relied on the general review provisions of the Administrative Procedure Act. Since in this instance the statute specifically provides for review, a less strict test for standing may be justified. *See* Scott, Standing in the Supreme Court—A Functional Analysis, 86 Harv. L. Rev. 645, 667-68 (1973).

at 154; *Sierra Club v. Morton, supra*, 405 U.S. at 734; *United States v. SCRAP*, 412 U.S. 669, 686 (1973). WUTC's allegation that the FCC order will affect the discharge by WUTC of its duty to protect the interest of Washington telephone users arises too plausibly from the known facts of the industry to be dismissed as "an ingenious academic exercise in the conceivable." *United States v. SCRAP, supra*, 412 U.S. at 688.[9] And it is no bar to WUTC's standing that the line of causation between the FCC order and interference with WUTC's performance of its duties may be attenuated. *Id.* at 688-90.

The obligation interfered with is imposed directly and specifically upon WUTC by statute. Thus, WUTC seeks to discharge a legal duty—it does not act from a generalized "motivation," *Schlesinger v. Reservists Committee to Stop the War*, ... U.S. ....., ... (1974) (slip at 17), or because of a "'mere 'interest in a problem,'" *Sierra Club v. Morton, supra*, 405 U.S. at 739; and its concern is not of a kind shared by citizens generally. *Schlesinger v. Reservists Committee to Stop the War, supra*, ... U.S. at ..... (slip at 12); *United States v. Richardson, supra*, ... U.S. at ..... (slip at 10-12). As Judge Leventhal said in a singular context, "We should not be niggardly in guaging the interest of a state administrative officer in the validity of what his federal counterpart has done in an area of overlapping fact and intertwined law." *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967).

In *Coleman v. Miller*, 307 U.S. 433 (1939), the Supreme Court strongly suggested, in a somewhat different context, that for purposes of standing, impairment of an administrative agency's interest in the effective discharge of the obligations imposed upon the agency by law, is the equivalent of the "personal stake," "injury in fact," or "concrete injury" that would support standing

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[9]The FCC found there is "no reason to anticipate that new entry in the specialized field would result in any substantial diversion of A.T. & T.'s revenues or would have any significant adverse impact on telephone users" (29 F.C.C.2d at 912), but this finding cannot be conclusive on the issue of standing—one of the issues WUTC seeks to raise on review is that this finding is not sustained by the record. *See* United States v. SCRAP, 412 U.S. 669, 688-90 (1973); Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 153, 158 (1970).

of a private plaintiff. The immediate question in *Coleman v. Miller* was whether state senators opposing ratification of the Child Labor Amendment had standing to seek review by the Supreme Court of a state court decision sustaining the right of the lieutenant governor to cast a decisive vote in favor of ratification. The Supreme Court held that the senators' interest in maintaining the effectiveness of their votes was sufficient to support standing. The Court noted, "[T]here has been recognition of the legitimate interest of public officials and administrative commissions, federal and state, to resist the endeavor to prevent the enforcement of statutes in relation to which they have official duties." 307 U.S. at 441-42. Reviewing certain of its past decisions, the Court concluded (*id.* at 445):

> This class of cases in which we have exercised our appellate jurisdiction on the application of state officers may be said to recognize that they have an adequate interest in the controversy by reason of their duty to enforce the state statutes the validity of which has been drawn in question. In none of these cases could it be said that the state officers invoking our jurisdiction were sustaining any "private damage."

United States ex rel. Chapman v. Federal Power Commission, supra, 345 U.S. at 153, also holds, though without discussion, that an adverse effect on the performance of official duties constitutes the kind of injury necessary to support standing to sue. The Secretary of the Interior was permitted to challenge an FPC order granting a license to a private company to build a generating plant on a site that the Secretary argued had been withdrawn from the licensing jurisdiction of the FPC and reserved for public construction. The Court set out the bases relied upon by the Secretary for standing as follows (345 U.S. at 155-56):

> The Secretary of the Interior points to his statutory duty to act as sole marketing agent of power developed at public hydroelectric projects and not required for the operation of the project; §5 of the Flood Control Act of 1944 directs him to transmit and dispose of such power in a manner calculated to "encourage the most widespread use thereof at the lowest possible rates to consumers consistent with

sound business principles." 58 Stat. 890, 16 U.S.C. § 825s. This provision, it is said, announces a congressional policy for the guidance of the Secretary that would be disturbed by the respondent company's plan; thus a specific interest of the Secretary, in addition to his more general duties relating to the conservation and utilization of the Nation's water resources, is said to be adversely affected by the Commission's order.

Because of "[d]ifferences of view" among the Justices, 345 U.S. at 156, the grounds for the holding that the Secretary had standing to seek review of the FPC order were not discussed. However, since the Secretary alleged no private injury of any kind, his standing necessarily rested upon the adverse effect of the FTC order on performance of his official duties to encourage widespread use of electricity at the lowest possible rates, and, more generally, to manage the nation's water resources.

The Supreme Court held in *Interstate Commerce Commission v. Oregon-Washington Railroad & Navigation Co.*, 288 U.S. 14, 24-25 (1933), that state agencies had standing to challenge a district court order reversing an ICC order requiring construction of several railroad routes, because the agencies "officially represent[ed] the interest of their states in obtaining adequate transportation service." In a different context, the Court held in *Securities & Exchange Commission v. United States Realty & Improvement Co.*, 310 U.S. 434 (1940), that the SEC should be permitted to intervene in a Chapter XI proceeding that the Commission alleged should have been brought under Chapter X, which provides for participation by the Commission. The Court said, "we think it is plain that the Commission has a sufficient interest in the maintenance of its statutory authority and the performance of its public duties to entitle it through intervention to prevent reorganizations which should rightly be subjected to its scrutiny, from proceeding without it." 310 U.S. at 460.

In this circuit the principle that a public agency has standing to seek judicial review of governmental action that affects the performance of its duties has been explicitly recognized by a three-judge court in a case involving WUTC's predecessor agency,

the Department of Public Works of the State of Washington. In *Department of Public Works v. United States,* 55 F.2d 392 (W.D. Wash. 1932), the department was held to have standing to obtain judicial review of an order of the Interstate Commerce Commission. The order provided that rates for transporting grain from points south of the Snake River in Washington and Oregon to Portland, Oregon, must be 10 per cent lower than the rates for shipment of grain from the same area to ports on Puget Sound, Washington. The effect of the order was to prescribe an intrastate rate that would otherwise have been subject to the jurisdiction of the state agency. The court held (55 F.2d at 394):

> . . . the laws of the United States having made provision for suits to set aside unauthorized orders of the Intrastate Commerce Commission, it would be unreasonable to deny to the petitioner the right to bring a suit such as the present in order that it may, in a proper case, remove obstacles to the exercise of its statutory powers. As long as the order of the Interstate Commerce Commission remains in effect, it is an obstacle hindering, if not preventing, the exercise by the department of its powers under section 10389.[10]

On the basis of these and other cases in which state and federal officials and agencies have been allowed to challenge a wide range of administrative orders affecting the discharge by the officer or agency of obligations imposed by law,[11] and because the purposes of the "injury in fact" requirement are adequately served, we conclude that the adverse effect of the FCC's order on WUTC's exercise of its statutory duties satisfies this element of the *Data Processing* test for standing.

The second requirement of *Data Processing* is also satisfied: The interest WUTC seeks to protect--reasonable intrastate telephone rates and, more generally, high quality and widely avail-

[10]Section 10389 is the predecessor of R.C.W. 81.28.230, which is identical to R.C.W. 80.36.140, *see* p. 6 *supra,* except that the former governs transportation of persons and property and the latter the transmission of messages by telegraph or telephone.

[11]*See also* Board of Educ. v. Allen, 392 U.S. 236, 241 n.5 (1968); Akron Bd. of Educ. v. State Bd. of Educ., 490 F.2d 1285 (6th Cir. 1974); Brewer v. Hoxie School Dist., 238 F.2d 91, 104 (8th Cir. 1956).

able intrastate telephone service—is "arguably within the zone of interests to be protected" by the Federal Communications Act. The statutory standard governing the licensing of communications carriers is the "public convenience and necessity," 47 U.S.C. § 214(a), and the touchstone of decision in applying this standard is "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. The Commission's broad mandate would not permit it to ignore the impact of its orders upon the quality and cost of local telephone service which constitutes the vast bulk of the total telephone service used by the people of the United States.[12] This is obviously the Commission's view, for it gave specific consideration to that impact in the present proceeding. *See* 31 F.C.C.2d at 1107-08.

Permitting a public agency charged with relevant legal obligations to obtain judicial review of a final order of a regulatory agency specifically declared reviewable by Congress, on the ground that the order has an adverse impact on the complainant agency's performance of its statutory obligations, presents no potential whatever for abuse of the judicial process or distortion of the role of the Judicial branch of government in its relationship to the Executive and the Legislative branches—concerns that may have some substance where private litigants assert standing as taxpayers or citizens to initiate plenary actions challenging the constitutionality of federal statutes or of the conduct of executive departments. *See, e.g., Schesinger v. Reservists to Stop the War, supra; United States v. Richardson, supra.* Indeed, allowing such agencies standing may often be the only practical means of effectuating Congress' declaration that judicial review of particular federal agency action is appropriate. In the present

[12]Approximately 169 billion calls were transmitted in 1969. Of these, almost 160 billion were local calls regulated by state commissions. 36 FCC Annual Reports, Table at 255 (1970). Of the approximately 9.5 billion toll calls, a substantial number were intrastate and therefore also subject to state regulation. The FCC exercises jurisdiction over approximately 25% of A.T. & T.'s plant. State commissions exercise jurisdiction over the remaining 75% and over virtually all of the plant of the independent (non-Bell) telephone companies. Re American Tel. & Tel. Co., 70 P.U.R. 3d 129, 145, ¶ 21 (1967).

case, for example, although judicial review of the Commission's order is expressly provided for, any adverse impact of the FCC order on intrastate telephone rates would probably be so indirect, and take place so gradually, that individual users of intrastate telephone service would be unaware of it, or, in any case, would have inadequate incentive to incur the expense of judicial review. *See Akron Board of Education v. State Board of Education*, 490 F.2d 1285, 1289-90 (6th Cir. 1974).

We therefore hold that WUTC has standing in its own right to secure judicial review of this FCC order.

WUTC may also obtain review of the challenged FCC action as *parens patriae*.[13] A substantial portion of Washington's citizens would be affected by an increase in intrastate telephone rates. *Cf. Kansas v. Colorado*, 206 U.S. 46, 99 (1907). Petitions for review by individual users are not a practicable remedy. *See Missouri v. Illinois*, 180 U.S. 208, 241 (1901). The state has an interest independent of its individual citizens, for increased rates for intrastate telephone service would inhibit communication vital to the economic and social well-being of the community as a whole. *See Georgia v. Pennsylvania Railroad*, 324 U.S. 439, 450-51 (1945); *Pennsylvania v. West Virginia*, 262 U.S. 553, 592 (1923); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907); *California v. Frito-Lay, Inc.*, 474 F.2d 774, 775 (9th Cir. 1973). The fact that communications rates are closely regulated by both the United States and the various states reflects the presence of a governmental interest above and beyond the

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[13]States or territories have been permitted to sue as *parens patriae* for review of federal regulatory agency decisions in many cases. *E.g.*, Guam v. Federal Maritime Comm'n, 329 F.2d 251, 252-53 & n.7 (D.C. Cir. 1964); California v. FPC, 296 F.2d 348 (D.C. Cir. 1961), *rev'd on other grounds*, 369 U.S. 482 (1962); Puerto Rico v. Federal Maritime Bd., 288 F.2d 419 (D.C. Cir. 1961); New York v. United States, 65 F. Supp. 856, 872 (N.D. N.Y. 1946), *aff'd*, 331 U.S. 284 (1947). *See also* Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954), *aff'g* Wisconsin v. FPC, 205 F.2d 706 (D.C. Cir. 1953) (standing apparently based on *parens patriae*, though standing issue not discussed); PUC v. FPC, 205 F.2d 116, 119 (3d Cir. 1953) (assuming standing without deciding).

WUTC's authority to initiate these judicial proceedings on behalf of the people of the State of Washington is found in R.C.W. 80.01.075. *See* note 6.

concerns of the individual citizen.[14] Finally, none of the considerations that have justified restrictions upon the power of the state to represent the interest of its citizenry *parens patriae* are present here. The original jurisdiction of the Supreme Court is not invoked, and the availability of a remedy need not be restricted by the necessity of husbanding that court's limited resources. Since no state is sued, there is no threat of circumvention of the Eleventh Amendment. *See, e.g., Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258 n.12 (1972); *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 392-93 (1938).[15] Since no damages are sought, there is no risk of duplicating recoveries. *Hawaii v. Standard Oil Co., supra*, 405 U.S. at 261-64. Since no absent persons will be barred from a remedy otherwise available if this petition is entertained, the proceeding is not subject to criticism as a substitute for a class action without its safeguards. *California v. Frito-Lay, Inc., supra*, 474 F.2d at 777 n.11.

The argument is made that WUTC is barred from maintaining a *parens patriae* challenge to an order of an agency of the federal government by the holding of *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923), that "[w]hile the State, under some circumstances, may sue [as *parens patriae*] for the protection of its citizens (*Missouri v. Illinois*, 180 U.S. 208, 241), it is no part of its duty to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae* . . . ."

The doctrine of *Massachusetts v. Mellon* is not applicable to this proceeding. Massachusetts had alleged that a federal statute was unconstitutional as a usurpation by Congress of power reserved to the states. As the Court pointed out in *Georgia v. Pennsyl-*

[14] At least where injunctive relief is sought, the grounds separately listed here may be alternative. An independent state interest may be sufficient, whether or not a substantial portion of the citizenry is affected or an adequate individual remedy is available. Note, Federal Jurisdiction—Suits by a State as *Parens Patriae*, 48 N.C. L. Rev. 963, 969 (1970).

[15] "Today the policy underlying the eleventh amendment appears to be the principal limitation on the state's attempt to assert the interests of its citizens as *parens patriae*." Comment. The Original Jurisdiction of the United States Supreme Court, 11 Stan. L. Rev. 665, 674 (1959).

vania Railroad, supra, Massachusetts sought to litigate a "question of distribution of powers between the State and the national government" (324 U.S. at 445), and "protect her citizens from the operation of federal statutes" *(id.* at 447). There are no such questions here. WUTC does not attack the constitutionality of the Communications Act on any ground; rather, it relies upon the federal statute, and seeks to vindicate the congressional will by preventing what it asserts to be a violation of that statute by the administrative agency charged with its enforcement. That federal agency is not the only public body that may invoke judicial assistance to enforce the Act. *See Georgia v. Pennsylvania Railroad, supra,* 324 U.S. at 447 ("The fact that the United States may bring criminal prosecutions or suits for injunctions under [the antitrust] laws does not mean that [a state] may not maintain [a *parens patriae* suit]").[16]

B.

We turn to the standing of the National Association of Regulatory Utility Commissioners (NARUC). A substantial argument

[16]The *Georgia v. Pennsylvania R.R.* majority rejected the broad principle stated by Justice Stone in dissent that "[t]he federal government alone stands in such relationship to the citizens and inhabitants of the United States, as to permit the bringing of suit in their behalf, to protect them from the violation of federal laws relating to interstate commerce." 324 U.S. at 474. *See also* Note, Federal Jurisdiction—Suits by a State as *Parens Patriae,* 48 N.C. L. Rev. 963, 966-67 (1970).

In Minnesota v. Benson, 274 F.2d 764 (D.C. Cir. 1960), this theory was invoked to deny Minnesota the right as *parens patriae* to obtain judicial review of an order of the Secretary of Agriculture. But in Guam v. Federal Maritime Comm'n, 329 F.2d 251, 252 (D.C. Cir. 1964), *Benson* was limited to review of "an action of the federal government *itself, i.e.,* a milk regulation." The court held in *Guam* that "in utility cases involving private operators a state or municipal government may be a proper party and, if adversely affected as such by an order, is aggrieved," and may obtain judicial review. *Id.* at 253.

In a footnote in PUC v. United States, 356 F.2d 236, 241 n.1 (9th Cir. 1966), Judge Madden queried whether *Mellon* barred review of an FCC order on petition of the California commission, but concluded that it was not necessary to answer the question in that case.

The authority of *Mellon,* at least as a broad rather than a narrow proposition, may have been "eroded by time." Massachusetts v. Laird, 400 U.S. 886, 889 (1970) (Douglas, J., dissenting from denial of leave to file bill of complaint). Indeed, the Supreme Court has allowed a state

can be made that NARUC has standing in its own right,[17] but we need not reach that question. NARUC describes itself as a

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to challenge as *parens patriae* an allegedly unconstitutional congressional statute. South Carolina v. Katzenbach, 383 U.S. 301 (1966). This action has been taken by several commentators as casting doubt on the *Mellon* proposition. C. Wright, Law of Federal Courts 503 (1970); Bickel, The Voting Rights Cases, 1966 Sup. Ct. Rev. 79, 87-89. It would be improvident to extend a doctrine that is of questionable authority in its original application.

[17]NARUC is not merely a "concerned bystander" seeking "vindication of value interests." United States v. SCRAP, 412 U.S. 669, 687 (1973). Congress has accorded NARUC official status as the representative of state regulatory agencies in dealing with the basic problem underlying these petitions for review.

A brief statement of the joint efforts of the FCC and NARUC in the area of allocating common carrier property and expenses between interstate and intrastate operations, as the base for determining telephone rates, is found in footnote 7. *See also* S. Rep. No. 92-362, 92d Cong., 1st Sess. (1971), 2 U.S. Code Cong. & Admin. News 1511, 1513-14, accompanying H.R. 7048 enacted as P.L. 92-131, amending 47 U.S.C. § 410.

The latter amendment provides for the creation of a Federal-State Joint Board to consider proceedings "regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations." 47 U.S.C. § 410(c). The statute further provides, "The Joint Board shall be composed of three Commissioners of the [Federal Communications] Commission and of four State commissioners nominated by the national organization of the State commissions, as referred to in section 302(b) and 305(f) of Title 49, and approved by the Commission." *Id.* The "national organization" referred to is NARUC. *See* H.R. Rep. No. 253, 89th Cong., 1st Sess. (1965), 2 U.S. Code Cong. & Admin. News 2923, 2928.

The order sought to be reviewed in this case is not directly concerned with the "separations" problem. However, the petitioners allege that the order will have an effect in this area that will impair the performance of obligations that, in the case of WUTC, are officially imposed, and, in the case of NARUC, are officially sanctioned.

Although NARUC is not compelled by statute to discharge these obligations, it assumed them with the acquiescence, encouragement, and solicitation of the Congress and the Commission. As Judge Leventhal has said, "Interest groups are, in today's complex society, an indispensable part of an effective channel of communication between government and the persons whose conduct the government seeks to affect." National Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 694 (D.C. Cir. 1971). "[W]hether or not this begins as a duty, it is a necessity, and gives rise to relationships that cannot be ignored by the courts." *Id.*

"quasi-governmental nonprofit organization" composed of "the governmental bodies of the fifty States engaged in the regulation of utilities and carriers,"[18] including WUTC. Since WUTC and other public agencies alleged to have similar duties are members of NARUC, and since WUTC and similar agencies have standing to sue,[19] NARUC's right to judicial review is established upon this ground alone. *Sierra Club v. Morton, supra,* 405 U.S. at 739; *National Association for the Advancement of Colored People v. Button,* 371 U.S. 415, 428 (1963).[20]

II

On the merits, the issue most strongly pressed is that the Commission violated both substantive and procedural requirements of the Federal Communications Act in determining that a general policy in favor of entry of new carriers in the specialized communications field would serve the public interest. NARUC's principal argument is that under the "public interest, convenience, and necessity" standard of the Act, 47 U.S.C. §§ 214, 309, the Commission cannot approve new common carriers unless existing common carriers could not provide the service, and such a finding

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At least where the relationship is as nearly official and as relevant to the subject matter to be litigated as it is in this instance with respect to NARUC, the purposes of the standing requirement are satisfied for essentially the same reasons as they are with respect to WUTC.

[18]NARUC's petition for review states:

> The NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States engaged in the regulation of utilities and carriers. The mission of the NARUC is to improve the quality and effectiveness of public regulation in America. More specifically, the NARUC contains the State officials charged with the duty of regulating communication common carriers within their respective States and, as such, they have the obligation to assure the establishment and maintenance of such communications service and facilities as may be required by the public convenience and necessity, and the furnishing of service at rates that are just and reasonable.

[19]NARUC's petition for review specifically alleged injury to its member state commissions.

[20]Since NARUC has standing to raise the Federal Communications Act issues, it may also challenge the order for noncompliance with the National Environmental Protection Act, as it has sought to do. Sierra Club v. Morton, 405 U.S. 727, 737 (1972).

has not been, and could not be, made. WUTC emphasizes the procedural objection, arguing that under the provisions of the Act, 47 U.S.C. §§ 309, 316, an evidentiary hearing must be held on each pending application to decide whether the competition proposed by that application would further the public interest, and that a policy and rulemaking proceeding will not suffice.

A.

The business involved is that of providing specialized private or leased line communication services through microwave transmission facilities, as distinguished from public exchange and long distance toll telephone service. The latter consists primarily of voice communication service from and to all points on an integrated national and international telephone network, available to the public generally. The proposed service consists of communication of all types of signals, including data and other non-voice traffic, but only to or from limited points, and only pursuant to private contract. The applicants propose to offer users a wide range of choice as to cost, speed, and quality of transmission, part- or full-time availability, shared or exclusive usage, and utilization of the customer's own terminal equipment.

The Commission had earlier authorized private companies to build and operate their own microwave facilities to meet such specialized needs, upon a showing of financial and technical qualifications. Allocation of Microwave Frequencies above 890 Mc., 27 F.C.C. 359 (1959), 29 F.C.C. 825 (1960).

The Commission's Notice of the present proceeding stated the first issue to be "Whether as a general policy the public interest would be served by permitting the entry of new carriers . . . ." 24 F.C.C.2d 318, 327 (1970). The legal and factual bases upon which the Commission's staff recommended an affirmative answer were set out in detail in the Notice, and comments were solicited. *Id.* at 328-38. Over 200 interested persons responded, all but a few favoring the proposed policy. First Report and Order, 29 F.C.C.2d 870, 879 (1971). The Commission heard oral argument and received rebuttal comments. It then filed its report and order, concluding, among other things, that "a general policy in favor of the entry of new carriers in the specialized communications field would serve the public interest, convenience, and necessity." *Id.* at 920.

The Commission based its conclusion upon the following general findings: "[T]here is a public need and demand for the proposed facilities and services and for new and diverse sources of supply, competition in the specialized communications field is reasonably feasible, there are grounds for a reasonable expectation that new entry will have some beneficial effects, and there is no reason to anticipate that new entry would have any adverse impact on service to the public by existing carriers such as to outweigh the consideration supporting new entry." *Id.* These findings are based in turn upon subsidiary factual determinations, forecasts, and expert judgments detailed in the Commission's report. *Id.* at 904-20. These are briefly outlined in the margin.[21]

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[21]Use of microwave frequencies in the transmission of communications is a post-World War II development, capable of a wide range of specialized applications. The need for all communications services is growing rapidly. Existing carriers (principally A.T. & T. and Western Union) have not met the increasing and widespread need for diverse and flexible specialized communications services, particularly in the transmission of data. Market studies and independent forecasts establish that there is a very large undeveloped market for such services. Although there is some overlap, the services proposed by applicants are significantly different from those offered by established carriers. The applicants seek primarily to develop new services and markets, and to tap latent, undeveloped submarkets for existing service. The applicants offer service features designed to meet the special and diverse technical and service requirements of specialized users, achieving the economies and benefits of specialization. It is reasonable to conclude that the effect of new entry will be expansion of the total communications market. Competition within the market for specialized services should motivate innovation, and produce even greater growth rates.

The existing carriers' facilities and practices have been developed primarily to meet the needs of voice transmission. Major modifications may be required to meet the different needs for efficient data transmission. Moreover, the capability of established carriers to meet future requirements should not be determinative where growing future traffic is concerned and new services are proposed. Even if existing carriers might furnish the prospective services, other benefits are reasonably to be anticipated from new entry in the specialized communications field. New entry will provide flexibility and wider choice in satisfying expanding and changing requirements in this field.

It is questionable whether existing carriers can meet the new requirements in the specialized communications field and still meet the increasing requirements of the public monopoly services, particularly in view of the

The Commission's subsidiary findings weaken NARUC's factual premise that existing carriers might have been able to furnish the proposed services. Nonetheless, the Commission clearly re-

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diversity of such requirements, the designing and engineering problems involved, and the huge and increasing amounts of new capital required. Entry of new carriers would disperse the burdens, risks, and initiatives involved.

Competition in specialized communications would enlarge the equipment market for manufacturers other than Western Electric, and thus stimulate innovation. New carriers could devote their undivided attention to particular needs, and would be under pressure to innovate.

New carriers would provide a useful regulatory tool, furnishing a standard for comparison among specialized communications carriers, and encouraging beneficial changes in A.T.&T.'s services and charges.

New entry in the specialized field would not adversely affect the furnishing of services to the public by existing carriers. The specialized communications services involved constitute only a very small percentage of A.T.&T.'s total market. The market for standard voice communications services is not affected; it accounts for the bulk of A.T.&T.'s revenue, and it is also expanding with great rapidity. A.T.&T. will also be free to compete in the new field and is likely to obtain a very substantial portion of the potential market for specialized services. The potential impact on Western Union is greater, since a larger percentage of its service will be vulnerable to the new competition. However, a recently approved merger (In Re Western Union Tel. Co., 24 F.C.C.2d 664 (1970)) will add substantially to Western Union's revenue. Moreover, the market involved is new, relatively untouched, and growing at a very rapid rate, and Western Union may retain most of its present specialized business as well as capture a sizeable share of the potential market. The independent telephone companies do not furnish inter-city facilities, and to the extent the new entrants rely on existing local distribution facilities the business of independent telephone companies will increase.

The "cream skimming" charge is unfounded primarily because applicants propose to serve special service markets that have not yet been developed, and because they propose to serve all such markets, excluding none that has a significant need.

The contention that allowing new entry will sacrifice potential economies of size is rejected because the potential for such economies is not great in the specialized communications field in view of rapidly changing applications of improved technology and growing potential markets made up of diverse consumer demands. Attempts to adapt A.T.&T.'s voice communication facilities to data communication may leave users of both types of service unsatisfied and vitiate any economies of each. Any such economies that might be realized are overbalanced by the benefits that can be expected from the participation of smaller, specialized carriers.

jected NARUC's legal premise that the existence of such a capability would require rejection of applications from new carriers, and the merits of NARUC's contention must therefore be considered.

NARUC asserts that Congress, in enacting the Communications Act of 1934 and the amendments thereto, "clearly intended that the Commission would regulate common carriers as quasi-monopolies and that new entrants would only be authorized when existing carriers [could] not provide adequate service." For this proposition NARUC relies principally upon an historical review tracing the origin of sections 201-222 of Title II of the Communications Act to the Interstate Commerce Act, and upon decisions relating to the regulation of transportation common carriers.[22]

NARUC interprets the Communications Act too narrowly. As the Commission points out, "[t]he statutory standard governing the Commission's consideration of applications for microwave radio facilities to provide common carrier services is broadly stated in Sections 309 and 214 of the Communications Act: whether a grant would serve the present or future public interest, convenience, and necessity." 49 F.C.C.2d at 901. As the Commission further notes, and as we noted in Part I of this opinion, this broad standard is to be interpreted in light of the Commission's sweeping mandate to regulate "interstate and foreign com-

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[22] *E.g.*, American Trucking Ass'n v. United States, 326 U.S. 77, 86 (1945); McLean Trucking Co. v. United States, 321 U.S. 67, 83 (1944); Transit Comm'n v. United States, 289 U.S. 121, 125-26 (1933); Texas & New Orleans R.R. v. Northside Belt Ry., 276 U.S. 475, 479 (1928). *See also* Delta Airlines v. CAB, 442 F.2d 730, 733 (D.C. Cir. 1970); Delta Airlines v. CAB, 275 F.2d 632, 637-38 (D.C. Cir. 1959). NARUC also refers to language suggesting that traditional telephone and telegraph companies, because they were considered to be natural monopolies, were intended to be regulated with a presumption against competition, much as railroads had been. FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 474 (1940); National Ass'n of Theatre Owners v. FCC, 420 F.2d 194, 203 (1969). *See also* Hawaiian Tel. Co. v. FCC, ___ F.2d ___, ___ (D.C. Cir. May 3, 1974). For a specific rejection of the view that the public convenience and necessity standard of § 214 of the Communications Act is to be interpreted generally in the same manner as § 1(18) of the Interstate Commerce Act, *see* General Tel. Co. v. United States, 449 F.2d 846, 856 (5th Cir. 1971).

merce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges . . . ." (47 U.S.C. § 151), and "generally encourage the larger and more effective use of radio in the public interest" (47 U.S.C. §303(g)). *See* 49 F.C.C.2d at 901.

This statutory language does not suggest that the Commission is to give controlling weight to the mere fact that existing common carriers have the ability to perform the service an applicant wishes to furnish. Nor, for that matter, does it suggest that the Commission is to accord controlling weight to asserted benefits of competition, or to any other particular factor. The Commission's authority is stated broadly to avoid the need for repeated congressional review and revision of the Commission's authority to meet the needs of a dynamic, rapidly changing industry. *National Association of Theatre Owners v. Federal Communications Commission*, 420 F.2d 194, 199 (D.C. Cir. 1969). Regulatory practices and policies that will serve the "public interest" today may be quite different from those that were adequate to that purpose in 1910, 1927, or 1934, or that may further the public interest in the future.[23]

The power of the Commission, in determining the "public interest," to accord competitive considerations the weight the Commission gave to them in this case is fully supported by the Supreme Court's opinion in *Federal Communications Commission v. RCA Communications Inc.*, 346 U.S. 86 (1953).[24] The Court held that the Commission could not treat the encouragement of

[23]Cases cited by the Commission (29 F.C.C.2d at 901) sustain its interpretation of §§ 4(i) and (j) and 303(r) of the Communications Act, 47 U.S.C. §§ 154(i) and (j), 303(r), as conferring " 'not niggardly but expansive powers' and wide discretion to adopt flexible procedures, rules and orders to meet ever-changing communications needs. . . . *National Broadcasting Co. v. United States*, 319 U.S. 190; *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137-138; *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172-173; *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202-203."

[24]General Tel. Co. v. United States, 449 F.2d 846, 857-58 (5th Cir. 1971). *See also* Gulf States Util. Co. v. FPC, 411 U.S. 747, 759 (1973); City of Huntington Library v. FPC, ... F.2d ....., ... (D.C. Cir. 1974).

competition as such as "the single or controlling reliance for safeguarding the public interest," *(id.* at 93), and therefore could not authorize entry of a competing carrier on the naked assumption that as a matter of national policy, competition was to be fostered if "reasonably feasible" *(id.* at 95). Because the Commission had authorized a new radio telegraph service on just that premise, the case was remanded for reconsideration. The Court made it clear, however, that "competition is a relevant factor in weighing the public interest," and if the Commission had "clearly indicated that it relied on its own evaluation of the needs of the industry rather than on what it deemed a national policy, its order would have a different foundation." *Id.* at 94. The Court spelled out the basis upon which the Commission could authorize new entry because of competitive considerations *(id.* at 96-97):

> We think it not inadmissible for the Commission, when it makes manifest that in so doing it is conscientiously exercising the discretion given it by Congress, to reach a conclusion whereby authorizations would be granted wherever competition is reasonbly feasible. This is so precisely because the exercise of its functions gives it accumulating insight not vouchsafed to courts dealing episodically with the practical problems involved in such determination. Here, however, the conclusion was not based on the Commission's own judgment but rather on the unjustified assumption that it was Congress' judgment that such authorizations are desirable. . . .
>
> In reaching a conclusion that duplicating authorizations are in the public interest wherever competition is reasonably feasible, the Commission is not required to make specific findings of tangible benefit. It is not required to grant authorizations only if there is a demonstration of facts indicating immediate benefit to the public. To restrict the Commission action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles "by specialization, by insight gained through experience, and by more flexible procedure." *Far East Conf. v. United States,* 342 U.S. 570, 575. In the nature of things, the possible

> benefits of competition do not lend themselves to detailed forecast, cf. *Labor Board v. Seven-Up Co.*, 344 U.S. 344, 348, but the Commission must at least warrant, as it were, that competition would serve some beneficial purpose such as maintaining good service and improving it. Although we think RCAC's contention that an applicant must demonstrate tangible benefits is asking too much, it is not too much to ask that there be ground for reasonable expectation that competition may have some beneficial effect. Merely to assume that competition is bound to be of advantage, in an industry so regulated and so largely closed as is this one, is not enough.

We have quoted the Court at length because it is evident from the Commission's opinion in the present case that the Commission was fully conscious of the guidelines announced in *RCA Communications*, and sought conscientiously to follow them. Our earlier summary of the Commission's opinion demonstrates that the Commission succeeded. *See* note 21 *supra*. The Commission's policy determination that the public interest would be served by entry of new carriers in the specialized communications field is based upon its own judgment that such authorizations are desirable, a judgment reached in a conscientious exercise of the discretion vested in the Commission by Congress. As to the benefits of competition, the Commission said, "It is our judgment, based on our cumulative knowledge of the industry and the entire record in this proceeding—including our staff's analysis, that there is a sufficient ground for a reasonable expectation that new entry here will have some beneficial effects. We so warrant." 29 F.C.C.2d at 910. Against there benefits, the Commission carefully weighed possible adverse effects of competition upon existing carriers and their services (29 F.C.C.2d at 910-14) before finally concluding that a general policy of new entry would serve the public interest, convenience, and necessity.

The Supreme Court's disposition of *RCA Communications* is flatly inconsistent with NARUC's contention that new entry is impermissible if it will result in duplication of facilities of existing carriers capable of furnishing the service. The Supreme Court noted that the Commission had found that more facilities

were then authorized than were necessary to handle the present and expected volume of traffic under sound operating conditions. 346 U.S. at 88.[25] Nonetheless, the Court remanded with the express understanding that the Commission might permit entry of new carriers if it found the public interest would be served.

The disposition on remand is significant. As the Commission notes (29 F.C.C.2d at 902 n.19):

> On remand in that case the Commission concluded on the basis of its experience that competition resulting from a grant of the application was reasonably feasible and would serve the public interest. It stated: "What we require is that, in order to be successful an applicant must demonstrate that, as has been done here, through the operation of such a circuit, some public need would be served or some advantage would accrue to the public, or at least that there is a reasonable expectation that such competition may have some beneficial effect." *Mackey Radio and Telegraph Company, Inc.*, 19 FCC 1321, 1350 (1955), aff'd. *RCA Communications, Inc. v. FCC*, 238 F.2d 24, 27-28 (1956), *cert. den.* 352 U.S. 1004 (1957).

As the Commission puts it, *RCA Communications* stands for the proposition that "while wasteful duplication is generally to be avoided, duplication is not wasteful where a certificating agency appropriately concludes that competition is reasonably feasible and may be expected to have some beneficial effect." 29 F.C.C.2d at 902 n.20.

Assuming that the use of rulemaking procedures in this case was appropriate, we are not persuaded by NARUC's attacks upon the sufficiency of the record in support of the rule adopted. We are satisfied that "there is sufficient relationship between the Commission's conclusion and the factual bases in the record upon which it relied to substantively support this exercise of its

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[25]This finding prompted Justice Douglas to dissent from the Court's ultimate disposition of the case, arguing that remand would be fruitless because the Commission, exercising its independent judgment, could not possibly find that the entry of new carriers would serve the public interest. 346 U.S. at 99.

authority." *United States v. Allegheny-Ludlum Steel Co.*, 406 U.S. 742, 755-56 (1972).[26]

Not surprisingly, both NARUC and WUTC place some emphasis upon the contention that the Commission did not give sufficient consideration to the risk that new specialized carriers would divert interstate business from the established carriers, leading to higher rates for local users. It is argued that the Commission did not sufficiently investigate the nature and size of the market or the potential economic impact of new entrants. The Commission specifically addressed itself to these contentions. 29 F.C.C.2d at 910-14, 917-20; 31 F.C.C.2d at 1107-08. Its response is adequate.

There is truth in NARUC's charge that the Commission's decision rests in good part upon "suppositious eventualities." Planning necessarily rests upon the acceptance of uncertain forecasts of future events. No other course is possible if the Commission is to formulate regulatory practices and policies that will enable the industry to satisfy future public needs.[27]

B.

We turn now to WUTC's argument that it was improper for the Commission to employ policy- and rulemaking procedures to determine whether competition would further the public inter-

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[26]The Court explained this standard of review as follows:

> We do not weigh the evidence introduced before the Commission; we do not inquire into the wisdom of the regulations that the Commission promulgates, and we inquire into the soundness of the reasoning by which the Commission reaches its conclusions only to ascertain that the latter are rationally supported.

406 U.S. at 742. Prior to this decision, there was disagreement among lower courts as to the standard of review of agency rules such as those involved in *Allegheny-Ludlum Steel Corp.* and in this case. *Compare* California Citizens Band Ass'n v. United States, 375 F.2d 43, 53-54 (9th Cir. 1967) and Superior Oil Co. v. FPC, 322 F.2d 601, 619 (9th Cir. 1963) *with* City of Chicago v. FPC, 458 F.2d 731, 741-45 (D.C. Cir. 1972).

[27]FCC v. RCA Communications, Inc., 346 U.S. 86, 96-97 (1953); United States v. Detroit & Cleveland Nav. Co., 326 U.S. 236, 241 (1945); GTE Serv. Corp. v. FCC, 474 F.2d 724, 731 (2d Cir. 1973); *see* American Airlines, Inc. v. CAB, 359 F.2d 624, 633 (D.C. Cir. 1966).

est rather than determining this issue in adjudicative hearings on individual applications.

At the outset, it is clear that if it was permissible for the Commission to adopt a general and nationwide policy that the public interest would be served by permitting the entry of new carriers in the specialized communications field, it was appropriate for the Commission to do so in a rulemaking proceeding. The policy proposed and adopted by the Commission falls precisely within the Administrative Procedure Act's definition of a "rule."[28] The problem confronting the Commission met uniformly accepted standards for utilization of rulemaking procedures: It affected large numbers of individual situations, it involved determination of a general policy applicable equally to all in the affected class, case-by-case adjudication would require repetitious determination of precisely the same issue, it concerned future events, and it required a broad judgment, legislative in nature, rather than resolution of a particular dispute of fact.[29]

The crucial question is whether the Commission acted within its statutory authority in adopting a general policy favoring entry of new carriers rather than considering the costs and benefits of the specific proposal in each application. We hold that the Commission did act within its authority.

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[28]A "rule" is defined as "[t]he whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4).

[29]"It must be emphasized that here the Commission is moving into a new area of policy affecting large numbers of telephone carriers. The advantages of rule-making over adjudicatory proceedings in such circumstances are well understood." GTE Serv. Corp. v. FCC, 474 F.2d 724, 732 (2d Cir. 1973). "Adjudicatory hearings serve an important function when the agency bases its decision on the peculiar situation of individual parties who know more about this than anyone else. But when, as here, a new policy is based upon the general characteristics of an industry, rational decision is not furthered by requiring the agency to lose itself in an excursion into detail that too often obscures fundamental issues rather than clarifies them." WBEN, Inc. v. United States, 396 F.2d 601, 618 (2d Cir. 1968). "The adversary nature of [a trial-type] proceeding is particularly suited to the determination of 'adjudicative' facts, but not to the development of 'legislative' facts—that is, to determine specific events in the past which are contested rather than general information

WUTC contends that 47 U.S.C. §§ 214 and 309, particularly the latter, bar formulation of a policy determination in rulemaking proceedings that the public interest would be served by the entry of new carriers. As WUTC points out, section 309(a) provides that "the Commission shall determine, in the case of each application filed with it . . . whether the public interest, convenience, and necessity will be served by the granting of such application"; and sections 309(d)(2) and 309(e) mandate an adjudicatory hearing, conducted in accordance with 5 U.S.C. § 556(d), if "a substantial and material issue of fact is presented."

The Commission points out that it did act upon the merits of individual applications: "[T]his proceeding does not undertake to decide all of the issues pertinent to pending applications, and does not go to the qualifications of the applicants or the sufficiency of particular proposals. Such questions will be resolved by appropriate procedures when the applications are processed [under § 309]." *See* 29 F.C.C.2d at 896. WUTC responds that by adopting a policy in favor of competitive entry the Commission decided the substance of the issue of public interest, convenience, and necessity as to each of the pending applications, leaving open only whether the particular applicant is qualified and the proposed service is technically and economically sound. WUTC asserts that the adequacy of existing service, the need for the new service, and the desirability of competitive entry must also be determined in adjudicatory proceedings upon each application pursuant to section 309.

The same argument has been advanced repeatedly both under the statutory provisions involved here and analogous statutes, and has been repeatedly rejected.

Sections 4(i), 4(j) and 303(r) of the Act, 47 U.S.C. §§ 154(i) & (j), 303(r), describe the Commission's broad power to issue

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upon which policy decisions are based." Note, The Judicial Role in Defining Procedural Requirements for Agency Rulemaking, 87 Harv. L. Rev. 782, 784 (1974). *See also* United States v. Florida East Coast Ry., 410 U.S. 224, 245-46 (1973); FPC v. Texaco, Inc., 377 U.S. 33, 44 (1964); SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947); City of Chicago v. FPC, 458 F.2d 731, 739 (D.C. Cir. 1971); General Tel. Co. v. United States, 449 F.2d 846, 863 n.15 (5th Cir. 1971); Airline Pilots Ass'n v. Quesada, 276 F.2d 892, 895-96 (2d Cir. 1960).

rules and regulations.[30] Section 309 defines the Commission's authority in granting or denying an individual application. WUTC's "contentions sharply pose the issue whether provisions for general rule making by administrative agencies are to be applied in their apparent breadth or are limited by other statutory provisions seemingly framed to deal with the different problem of individual applications. In resolving the conflict it is well to remember that Congress could hardly have intended to deprive administrative agencies of the ability to administer." *WBEN, Inc. v. United States*, 396 F.2d 601, 607 (2d Cir. 1968).

As the concluding admonition foretells, *WBEN, Inc.* resolved the conflict in favor of the Commission's broad rulemaking power. Acting under section 303(r) of the Act, the Commission in that case had promulgated a new rule limiting the predawn broadcasting rights of a class of broadcasters. The latter contended that a separate evidentiary hearing as to each licensee was required by section 316(a) of the Act which permits modification of a station license or permit only if the Commission determines "such action will promote the public interest, convenience, and necessity," and requires that the holder be given an opportunity to show cause "by public hearing" why the modification should not issue. The court held (396 F.2d at 618):

> But no case cited to us has held that § 316 thus disables the agency in the exercise of its rulemaking powers. Rather, in the only decision in point, the Ninth Circuit upheld the Commission's modification of existing license rights by rule, declaring that § 316's "primary function is to protect the individual licensee from a modification order of the Commission and is concerned with the conduct and other facts peculiar

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[30] 47 U.S.C. § 154(i) provides:

> The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

47 U.S.C. § 154(j) provides in part:

> The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. . . .

47 U.S.C. § 303(r) authorizes the Commission to:

> Make . . . such rules and regulations and prescribe such restrictions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter . . . .

to an individual licensee." California Citizens Band Association v. United States, 375 F.2d 43 (1967), cert. denied, 389 U.S. 844, 88 S.Ct. 96, 19 L.Ed.2d 112 (1967). The decision draws the proper line.

Another of the Commission's rules involved in *WBEN, Inc.* provided that an authorization to offer pre-sunrise broadcast service was to issue to eligible stations merely upon a showing as to technical matters. It was contended that this rule was precluded by the provisions of section 309(d) (the section relied upon by WUTC in this case) allowing any party in interest the right to file a petition to deny such an application, and requiring an evidentiary hearing to resolve any "substantial and material questions of fact." 396 F.2d at 621. The court held that the analysis of section 316 in relation to section 303(r) applied to section 309 as well. The court said (396 F.2d at 622):

> . . . § 309(d) was an attempt to provide a workable method whereby persons affected by an individual application for a license or its modification were to have notice and a reasonable period for registering their objections without, however, requiring the FCC to hold a hearing in every case where a petition to deny was filed. Nothing in the text or in the history indicates that the statute was addressed to the entirely different situation where, after proceeding under § 4 of the APA, the Commission utilizes the rule-making power granted by § 303(r) to alter the permissible times of operation by existing licensees, particularly since, as indicated above, compliance with § 309(d) after such a rule-making proceeding would generally be an exercise in futility.

The Supreme Court arrived at the same conclusion with respect to the relationship between the Commission's rulemaking power under section 303(r) of the Act and its duty to adjudicate under section 309 in *United States v. Storer Broadcasting Company*, 351 U.S. 192 (1956). Following a rulemaking proceeding under the authority of section 303(r), the Commission issued rules providing that in passing upon applications for television broadcasting licenses it would consider it to be contrary to public interest, convenience, or necessity for any party to have an interest in more than five television stations. Storer Broadcasting

Company had five such stations. On the day the rules were adopted, a pending application by Storer for an additional station was dismissed on the basis of the rule. Storer argued that by the express terms of section 309 its application could not be rejected without a "full hearing." The Supreme Court held, however, that the Act must be read as a whole, that section 309 did not withdraw the Commission's rulemaking power under section 303(r), that in the exercise of that power the Commission could announce in advance its attitude regarding concentration of control as it related to the public interest, and that unless an application set forth reasons sufficient to justify a change or waiver of the rule, section 309 did not require a hearing. 351 U.S. at 202-05.

Federal Power Commission v. Texaco, Inc., 377 U.S. 33 (1964), applied the same analysis to comparable provisions of the Natural Gas Act. Following rulemaking proceedings the Commission issued regulations providing that a producer's application for a certificate of public interest, convenience, and necessity under section 7 of the Act would be rejected if any contract submitted in support of the application contained certain forbidden provisions. An application submitted by Texaco, Inc. was rejected under the rule without a hearing despite the provision of section 7 that the Commission "shall set" such applications "for hearing." The Court of Appeals set aside the Commission's order, holding that the regulation was a valid statement of Commission policy, but that it could not "be used to deprive an applicant of the statutory hearing granted those who seek certificates of public convenience and necessity. 377 U.S. at 37. The Supreme Court reversed, holding, on the authority of *Storer*, "that the statutory requirement for a hearing under § 7 does not preclude the Commission from particularizing statutory standards through the rule-making process and barring at the threshold those who neither measure up to them nor show reasons why in the public interest the rule should be waived." *Id.* at 39.

The same principle was applied under similar statutory provisions in *American Airlines, Inc. v. Civil Aeronautics Board*, 359 F.2d 624, 628, 631 (D.C. Cir. 1966), and *Airline Pilots Association v. Quesada*, 276 F.2d 892 (2d Cir. 1960).

In *American Airlines, Inc.* the Civil Aeronautics Board issued a policy statement after rulemaking proceedings that only all-

cargo carriers could sell space for freight on a reserved basis at wholesale rates. The Board approved pending tariffs of all-cargo carriers providing for such service and summarily rejected the similar tariffs filed by combination carriers. The latter objected on the ground that the Board's action effected a modification of their certificates of public convenience and necessity which could be accomplished only after a full adjudicatory hearing under section 401(g) of the Federal Aviation Act, 49 U.S.C. § 1371(g). The court rejected the argument on the basis of the *Storer* rule "that notwithstanding the statutory hearing requirement the Commission retained the power to promulgate rules of general application consistent with the Act, and to deny an adjudicatory hearing to applicants whose applications on their face showed violations of the rule." 359 F.2d at 628. The court, in rejecting the suggestion that *Storer* applied only to regulations affecting future applications for new certificates, and not to regulations affecting rights under existing certificates, stated (359 F.2d at 629):

> [T]he *Storer* doctrine is not to be revised or reshaped by reference to fortuitous circumstances. It rests on a fundamental awareness that rule making is a vital part of the administrative process, particularly adapted to and needful for sound evolution of policy in guiding the future development of industries subject to intensive administrative regulation in the public interest, and that such rule making is not to be shackled, in the absence of clear and specific Congressional requirement, by importation of formalities developed for the adjudicatory process and basically unsuited for policy rule making.

Airline Pilots Association sustained a regulation issued by the Federal Aviation Agency after rulemaking proceedings that no person over 60 could serve as a commercial aircraft pilot. Plaintiffs argued that the regulation was invalid because it was issued without an adjudicatory hearing required by section 609 of the Federal Aviation Act of 1958, 49 U.S.C. § 1429, before an airman's license may be amended, modified, suspended, or revoked. The court rejected the argument, holding that section 1429 applied "only when an order of the Administrator is directed to an individual airman and is concerned with conduct or other facts peculiar to the airman," and was "not intended to apply

when a general directive of the Administrator is promulgated [under § 601 of the Act, 49 U.S.C. § 1421] though the regulation may in fact modify airmen's Certificates." 276 F.2d at 897.

WUTC distinguishes *Storer* on several grounds. It notes that the regulation involved in *Storer* set up standards that *barred* issuance of a certificate of public interest, convenience, and necessity to applicants who did not meet them, while in this case the standard *permitted* entry. The relevance of this difference is not apparent. The rules involved in *WBEN, Inc.* and *American Airlines* favored some grants and barred others. In either case the Commission uses rulemaking procedures to arrive at a general determination as to a matter relevant to the public interest, convenience, and necessity. To repeat, "the *Storer* doctrine is not to be revised or reshaped by reference to fortuitous circumstances." *American Airlines, Inc. v. Civil Aeronautics Board, supra,* 359 F.2d at 629.

WUTC seems to argue that *Storer* should not be applied because the issue resolved by rulemaking in this case is somehow more central to the discharge of the Commission's ultimate statutory responsibility to determine the public interest, convenience, and necessity. The rule involved in *Storer,* as in each of the other cases discussed, effectively determined that a class of applications would be approved or rejected, and thus effectively determined the public interest, convenience, and necessity as related to the disposition of each such application. These cases reject WUTC's assumption that adjudicatory proceedings are preferred if not mandated for the determination of issues central to the public interest. When, as here, the issue is resolved by adoption of a general policy for uniform application in the regulation of a nationwide industry, rulemaking is an entirely appropriate means for "a particularization of the Commission's conception of the 'public interest' sought to be safeguarded by Congress in enacting the Communications Act of 1934." *National Broadcasting Co. v. United States,* 319 U.S. 190, 218 (1943).

WUTC contends that the Commission bound "itself inflexibly to the licensing policies expressed" in its order, contrary to the requirement of *National Broadcasting Co. v. United States, supra,* 319 U.S. at 225; *see Federal Power Commission v. Texaco, Inc., supra,* 377 U.S. at 40-41; *United States v. Storer Broadcasting Company, supra,* 351 U.S. at 204-05. Though the Commission

said it would pass separately upon the merits of each pending application, presumably the rule would govern individual cases. That is its function. *Cf. Port Angeles Telecable, Inc. v. Federal Communications Commission*, 416 F.2d 243, 246 n.6 (9th Cir. 1969). Nonetheless, the Commission's regulations specifically provide for waiver of "rules, regulations or other requirements" upon an appropriate showing. 47 C.F.R. § 1.566 (1973); *United States v. Storer Broadcasting Company, supra*, 357 U.S. at 201, 205; *see also* 47 C.F.R. § 1.3 (1973); *WBEN, Inc. v. United States, supra*, 396 F.2d at 618. In addition, the Commission specifically noted (29 F.C.C.2d at 900 n.17): "As in the case of any policy or rule of general applicability, a waiver, exception or evidentiary hearing may be granted upon an adequate showing of exceptional circumstances making it inappropriate to apply the policy or rule in a particular situation." Further, the Commission said it would "examine future applications in light of the circumstances then shown," and expressed its willingness to alter its policy "if it no longer comports with the public interest, convenience, and necessity" (29 F.C.C.2d at 927), an assurance the Commission has recently reaffirmed. *See* In re Commission Policies Governing the Licensing and Regulation of Specialized Common Carriers, 44 F.C.C.2d 467, 471 n.2 (1973).

III

Both NARUC and WUTC challenge the Commission's conclusion that "it is not necessary or desirable in the public interest to hold comparative hearings for the purpose of restricting new entry in any particular area to only one private line applicant." 29 F.C.C.2d at 926. Again, the petitioners' arguments rest on somewhat different grounds.

NARUC's argument is not directed to comparative hearings as such; rather, under this heading, NARUC presents a general objection to the Commission's use of rulemaking procedures. Its argument is simply that section 309(e) requires an adjudicatory hearing when "a substantial and material question of fact is presented"; and that both the record in this proceeding and the several opinions filed in Microwave Communications Inc., 18 F.C.C.2d 953 (1969), demonstrate that many such questions were presented here, including the nature and extent of the market, the ability of existing carriers to supply it, whether the applicants proposed a different service than is now available, the

cost of the proposed service, the extent of duplication of facilities involved, the potential for "cream skimming," and the effect upon existing carriers of this and other potential consequences of competition. The answer to this argument, as we have said, is that rulemaking pursuant to section 303(r) is an alternative to adjudicatory proceedings under section 309 in a proper case, and that this is such a case. Rulemaking is hardly limited, as NARUC implies, to that certainly rare and probably entirely hypothetical situation in which the facts relevant to determination of a question of general policy are beyond dispute.[31]

WUTC's argument is that the Commission must inquire whether the service proposed by any of the applicants would preclude the service proposed by any other; and, if it would, that the Commission must hold a comparative hearing to determine which applicant should be authorized to render the service. WUTC relies primarily upon what are commonly referred to as the *Ashbacker* doctrine and the *Carroll* doctrine, originating in *Ashbacker Radio Corporation v. Federal Communications Commission*, 326 U.S. 327 (1945), and *Carroll Broadcasting Co. v. Federal Communications Commission*, 258 F.2d 440 (D.C. Cir. 1958).

Ashbacker involved two applications for broadcasting authority that were actually exclusive in the sense that the broadcast signals would interfere with each other. Only one of the two applications could be granted. The Commission granted one and

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[31]In United States v. Florida East Coast Ry., 410 U.S. 224 (1973), it was argued that because § 1(14)(a) of the Interstate Commerce Act required the Commission to give consideration to certain factors specified in the statute when it fixed the compensation to be paid by one railroad for the use of freight cars of another, the Commission was required to make its determination "on the record after opportunity for agency hearing" pursuant to 5 U.S.C. § 553(c), rather than by informal rulemaking procedures. The Court rejected the argument, stating (410 U.S. at 235):

> We know of no reason to think that an administrative agency in reaching a decision cannot accord consideration to factors such as those set forth in the 1966 amendment by means other than a trial-type hearing or the presentation of oral argument by the affected parties. Congress by that amendment specified necessary components of the ultimate decision, but it did not specify the method by which the Commission should acquire information about those components.

set the other for hearing. The Court held that as a practical matter this required the second applicant to justify displacement of an established licensee, and made the second applicant's right under section 309(a) to a hearing before denial an "empty thing." The Court held, "where two *bona fide* applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him." 326 U.S. at 333. Mutual exclusivity in the *Ashbacker* sense is not involved in this case.

Carroll held that, in some circumstances, before an application for a license can be granted a section 309 hearing is required "to determine whether the economic effect of a second license in this area would be to damage or destroy service to an extent inconsistent with the public interest," 258 F.2d at 443. As the *Carroll* court plainly stated, the doctrine of that case is simply a particularization of the public interest standard: "The basic charter of the Commission is, of course, to act in the public interest. It grants or denies licenses as the public interest, convenience and necessity dictate. Whatever factual elements make up that criterion in any given problem—and the problem may differ factually from case to case—must be considered." *Id.* *Carroll* recognized that sometimes competition may serve the public interest; sometimes it may not. If in a proceeding under section 309 the Commission is presented with a substantial showing that it will not, appropriate findings should be made. *Id.* at 444. The showing required is described in *WLVA, Inc. v. Federal Communications Commission*, 459 F.2d 1286, 1297 (D.C. Cir. 1972): "[A] petitioner seeking a hearing on the *Carroll* issue must plead specific factual data sufficient to make out a prima facie case that the economic consequences of a grant of the challenged application will lead to an overall derogation of service to the public."[32]

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[32]The Court continued:

Specifically, the petitioner must raise substantial and material questions of fact as to whether: (1) the revenue potential of the market is such that a grant will cause the petitioner to suffer a significant loss of income; (2) the effect of this loss will be to compel the petitioner to eliminate some or all of its public service programming; and (3) this loss of programming will not be offset by the increased non-network programming proposed to be offered by the applicant.

But once again, the Commission may determine general questions relating to the public interest, convenience, and necessity in rulemaking proceedings; and, specifically, may determine that competition in the furnishing of a class of regulated service will lead not to poorer but to better service to the public, and will otherwise be in the public interest. We have sustained the Commission's determination to this effect with respect to the specialized communications field as a whole, supporting a general policy favoring entry of new carriers nationwide. The Commission's determination with regard to comparative hearings is simply a reaffirmation of that general policy, as applied to the specific applications then pending.

The reasons given by the Commission in support of its conclusion that it would be contrary to the public interest and inconsistent with its policy determination in favor of new entry to limit entry among pending applications by holding comparative hearings on issues of economic exclusivity, are summarized in the margin.[33] They reflect a careful consideration of the rele-

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[33]As the Commission had concluded, the public interest would be served by offering users flexibility and a wide range of choice. The applicants were seeking to develop a relatively new and potentially very large market with heterogeneous submarkets. The proposals reflected differing routes and services. The various systems might develop along different lines. The number of potentially successful operations might well depend on the ingenuity, enterprise, and initiative of the participants in developing new services and equipment. Only four of the 33 applicants claimed economic exclusivity, and they failed to make a substantial prima facie showing that the potential specialized market along any route was so limited as to support only a single entrant. The remaining applicants are willing to proceed in the face of competition. The Commission has found a general public need and demand for the proposed services in all areas. The record as a whole indicates that entry by more than one private line carrier should generally be reasonably feasible, in view of the large and heterogeneous potential market. The investment and revenue requirements are such that a comparatively small share of the potential market may result in a financially successful operation for any one applicant and that a number of small carriers may co-exist in any particular region. If some fail, the adverse consequences would not be significant. Merger is more likely than bankruptcy or removal of facilities from the field. Even if a carrier is lost, demand for this type of communication could be met by another entrant or by an established carrier, and the frequencies would revert to the Commission for reassignment to others. There would be

vant factors, and a reasoned exercise of the Commission's discretion.[34]

IV

NARUC attacks the order on the additional ground that the Commission failed to consider the environmental impact of the policy adopted by the order, as required by section 102 of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332.

Neither NARUC nor any other party raised the NEPA claim before the Commission. The Commission argues that this court is barred from considering the claim by 47 U.S.C. § 405,[35] which "precludes judicial review of questions of law or fact that the Commission has not had an opportunity to pass upon." *Neckritz v. Federal Communications Commission*, 446 F.2d 501, 503 (9th Cir. 1971); *see Great Falls Community TV Cable Co. v. Federal Communications Commission*, 416 F.2d 238 (9th Cir. 1969).

NEPA does not permit the Commission to confine itself to consideration of environmental issues raised by the parties. *Calvert Cliffs' Coordinating Committee v. Atomic Energy Com-*

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minimal inconvenience to the public. If it should turn out that the market is spread so thin among the new entrants as to adversely affect their service to the public in an area, the Commission can take remedial action by rulemaking or comparative hearing at license renewal time. The Commission does not know whether all of the pending applications will be found qualified and, if so, will elect to proceed. Since new entry of more than one private applicant appears reasonably feasible in the potential market, the market place is a more reliable and effective instrument than the comparative hearing process for determining how many and which new entrants may succeed. In summary, it is desirable to avoid delay in the institution of services needed by the public now, the public will be benefited by the availability of diverse options, and there will be no public detriment if some of the pending applicants fail.

[34]The Commission responded briefly but adequately to WUTC's vigorously pressed argument that special consideration was required of applications to provide service in the Pacific Coast area. 29 F.C.C.2d at 899, 926-27.

[35]47 U.S.C. § 405 provides that "[t]he filing of a petition for rehearing shall not be a condition precedent to judicial review of any . . . order, decision, report, or action [by the Commission], except where the party seeking such review . . . (2) relies on questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass."

mission, 449 F.2d 1109, 1118-19 (D.C. Cir. 1971). The Commission is required "to consider environmental values 'at every distinctive and comprehensive stage of the [agency's] process.' The primary and nondelegable responsibility for fulfilling that function lies with the Commission." *Greene County Planning Board v. Federal Power Commission*, 455 F.2d 412, 420 (2d Cir. 1972), *quoting Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission, supra*, 449 F.2d at 1119. The immediate question, however, is not whether the FCC failed to discharge its obligations under NEPA, but whether its alleged failure may be considered on review of the Commission's order. That question is still governed by section 405(a), for "NEPA was not intended to repeal by implication any other statute." *United States v. SCRAP, supra*, 412 U.S. at 694.

But "the doctrine expressed in section 405 is not inflexible; it leaves room for the operation of sound judicial discretion to determine whether and to what extent judicial review of questions not raised before the agency should be denied." *Great Falls Community TV Cable Co. v. Federal Communications Commission, supra*, 416 F.2d at 239. A proper accommodation with NEPA requires that the appellate court in exercising its discretion under section 405 weigh the "lofty purposes" of NEPA (*United States v. SCRAP, supra*, 412 U.S. at 693) heavily in the balance.[36]

Giving full weight to NEPA's vital purposes, we conclude that in the particular circumstances of this case the balance should be struck against possible review and reversal of this

[36]The discretion exercised by the court under 47 U.S.C. § 405 is the same as that exercised in applying the general nonstatutory requirement of exhaustion of administrative remedies; for the doctrine "is substantially the same whether or not it happens to be embodied in such a statutory provision." K. Davis, Administrative Law Treatise § 20.06, at 92 (1958). *See also* McKart v. United States, 395 U.S. 185, 193 (1969). The factors to be considered are spelled out in McGee v. United States, 402 U.S. 479 (1971), and McKart v. United States, 395 U.S. 185 (1969). *See also* Crayeroft v. Ferrall, 408 F.2d 587 (9th Cir. 1969).

City of New York v. United States, 337 F. Supp. 150 (E.D.N.Y. 1972) (three judge court), does not hold that the general doctrine requiring exhaustion of administrative remedies is inapplicable to NEPA issues. In that case the NEPA issues were presented to the agency during the administrative process.

Commission order on the ground NARUC seeks to raise for the first time in this court. In reaching this conclusion, we do not mean to imply that an environmental impact statement would have been required had the issue been raised before the Commission.

Any damage that might be done to NEPA interests by failure to review the NEPA questions now is problematical and, in any event, slight. The FCC's order simply adopts policy. Before any construction is authorized, separate hearings must be held on each application. NEPA will be applicable to those proceedings. The FCC must consider "the environmental impact of the proposed action" as a whole, and in full context. It cannot treat each application separately from the others and ignore the total program of which it is a part.[37] There is no apparent obstacle to NARUC presenting its position on the environmental issue to the Commission in a proceeding on one or more of the individual applications; and, if the Commission fails to apply the proper standard, NARUC may obtain judicial review.

It is also of some relevance to the balancing of interests that NARUC's claims of environmental impact do not appear to be particularly substantial. If the order had not been entered, the specialized communications services would have been furnished by the present common carriers, using facilities built for that purpose. These carriers insist that they alone could and would have supplied all future needs for these services. The effect of the order will be to introduce competition in the furnishing of the services. The immediate effect of the order is upon who will furnish the service, not whether it will be furnished, or how much; competition may or may not increase the total volume

[37] *See* Natural Resources Defense Council v. Grant, 341 F. Supp. 356, 367 (E.D.N.C. 1972). The Guidelines of the Council on Environmental Quality provide:

> The statutory clause "major Federal actions significantly affecting the quality of the human environment" is to be construed by agencies with a view to the *overall, cumulative* impact of the action proposed (and of further actions contemplated). Such actions may be localized in their impact, but if there is *potential* that the environment *may* be significantly affected, the statement is to be prepared. Proposed actions, the environmental impact of which is apt to be highly controversial, should be covered in all cases. 36 Fed. Reg. 7724 (1971) (emphasis supplied).

of service performed. At issue is the incremental adverse effect that might result from the substitution of competition for monopoly, and only the portion of this increment, if any, that cannot be adequately considered in individualized hearings.

Balanced against these problematical and attenuated adverse consequences of denying review, the disadvantages of allowing NARUC and others similarly situated to bypass the administrative proceeding are substantial. We are denied the benefit of the Commission's views on even the threshold question of whether and to what extent NEPA applies in the peculiar substantive and procedural posture of this matter. If the NEPA issue had been timely raised, it might have been fully explored by the Commission, and could now be finally resolved, on an adequate record, without further delay. Such a resolution cannot now be achieved without great delay, waste, and expense. The order under consideration is a first step in a continuing, interrelated, administrative process. It is important that challenges to such a process be raised and resolved in its earlier stages so that subsequent steps may be undertaken with a full appreciation of the risks. *Cf. United States v. Tucker Truck Lines*, 344 U.S. 33, 37 (1952). Finally, we cannot ignore the potential for abuse if those who object to an agency's action, and would prefer to delay it if it cannot be wholly barred, are permitted to reserve an issue that might induce a remand if all else fails.

The order of the Commission is affirmed.

WALLACE, Circuit Judge, Concurring:

I concur in the result reached by the majority. However, I disagree that standing for Washington Utilities & Transportation Commission (WUTC) should be based on the alternative ground of *parens patriae*. Not only is the *parens patriae* reasoning unnecessary to decide this case but application of the doctrine appears to be barred by *Massachusetts v. Mellon*, 262 U.S. 447 (1923). There Massachusetts, acting as *parens patriae*, sued to prevent enforcement of the Maternity Act of 1921, alleging that it was an unconstitutional usurpation of state power. The Court stated:

> We need not go so far as to say that a State may never intervene by suit to protect its citizens against any form of enforcement of unconstitutional acts of Congress; but we are clear that the right to do so does not arise here. . . . [T]he citizens of Massachusetts are also citizens of the United States. It cannot be conceded that a State, as *parens patriae*, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. While the State, under some circumstances, may sue in that capacity for the protection of its citizens (*Missouri v. Illinois*, 180 U.S. 208, 241), it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae*, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.

Id. at 485-86.

The Supreme Court has relied upon *Massachusetts v. Mellon* to deny Florida standing to act as *parens patriae* in an action to enjoin collection of federal inheritance taxes in Florida. *Florida v. Mellon*, 273 U.S. 12, 18 (1927). The Court has also denied standing to the Governor of Louisiana to bring an original action on behalf of the state to enjoin the enforcement of a regulation under the Emergency Price Control Act of 1942 fixing maximum prices for strawberries. *Jones ex rel. Louisiana v. Bowles*, 322 U.S. 707 (1944) (Per Curiam). *See* H. Hart and H. Wechsler, *The Federal Courts and The Federal System* 276 (2d ed. 1973).

The holding of *Massachusetts v. Mellon* has not been, as the majority contends, "eroded by time." This phrase is from the dissenting opinion of Justice Douglas in *Massachusetts v. Laird*, 400 U.S. 886, 889 (1970), a case in which Massachusetts sought to adjudicate the constitutionality of the participation of the United States in the Vietnam war. The majority, however, denied the state leave to file a complaint either because it lacked standing or because it did not present a justiciable controversy. *See id.* at 887 (Douglas, J., dissenting). Furthermore, the Solicitor General had argued that *Massachusetts v. Mellon* barred the suit. *See id.* Thus, if any-

thing, this case implies that the doctrine of *Massachusetts v. Mellon* is alive and well.

Moreover, I believe the majority is wrong in asserting in footnote 16 that *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), "allowed a state to challenge as *parens patriae* an allegedly unconstitutional congressional statute." Quite the contrary, the Court held that *Massachusetts v. Mellon* barred a *parens patriae* suit by South Carolina. *Id.* at 324. Standing was granted to the state, not as *parens patriae* but in its own right, because the Voting Rights Act of 1965 arguably invaded powers reserved to the states. *See id.* at 323-27.

Finally, our decision in *Public Utilities Comm'n of California v. United States*, 356 F.2d 236 (9th Cir.), *cert. denied*, 385 U.S. 816 (1966), cites *Massachusetts v. Mellon* with approval in a situation identical to that presented by this case. There the California counterpart to WUTC challenged an ICC public notice that invited telephone companies to propose tariffs reducing interstate rates. We reasoned that public utility regulation has historically been a legislative function and that rate fixing by a regulatory commission is an essentially legislative act. *Id.* at 241. In a footnote we then discussed the *parens patriae* issue:

> This raises the question of whether petitioner has standing to maintain this suit in its capacity as a representative of the people of the State of California. It has long been recognized that a state, as *parens patriae*, cannot institute judicial proceedings to protect citizens of the United States from the operation of federal statutes because it is the United States, not the state, to whom citizens of the United States must look as *parens patriae* for protection of whatever rights they might have under federal legislation. Commonwealth of Massachusetts v. Mellon, 262 U.S. 447, 43 S.Ct. 597, 61 L.Ed. 1078 (1923).

Id. at 241 n.1 (dictum).

I must also specifically dissociate myself from footnote 17 of the majority opinion, which states that National Association of Regulatory Utility Commissioners (NARUC) has standing in its own right. As with the *parens patriae* discussion, this ground for

standing is not needed to decide this case. True, the majority has admitted it to be dicta and placed it in a footnote. Nevertheless, the argument should not go unchallenged.

The majority asserts that NARUC has standing because "Congress has accorded NARUC official status as the representative of state regulatory agencies in dealing with the basic problem underlying these petitions for review." I believe this to be incorrect. Congress has created a Federal-State Joint Board to consider the problems of allocating common carrier property and expenses between interstate and intrastate operations (which is one basis for determining telephone rates). 47 U.S.C. § 410(c). Each time the Federal Communications Commission has a proceeding which concerns the separation problem, it creates a Joint Board to act as a hearing examiner. The board then forwards its recommended decision to the full FCC. The board is composed of three FCC members and four state commissioners "nominated by the national organization of State commissions," which is NARUC. The state members may participate in the subsequent FCC deliberations, but they do not have a vote. *Id.*

Thus it is inaccurate to say that NARUC has "official status as the representative of state regulatory agencies," at least with respect to the functions of the Joint Board. First. NARUC only nominates the state members—the commission still has the responsibility to select them. The FCC's dominant role in the selection process is illustrated by the parallel provisions of subsection (a) giving the commission discretion to reject any nominee. 47 U.S.C. § 410(a). Second, only the state agency members actually appointed to the Joint Board serve as representatives of state commissions. They, not NARUC, sit on the board as hearing examiners; they, not NARUC, participate in the subsequent FCC deliberations.

NARUC's role is, therefore, rather limited. The organization itself cannot be injured by the FCC's action in the present matter: Its right to nominate will remain unimpaired. Certainly NARUC has an interest in the matter but only as an interest group like the Sierra Club. It may indeed have standing to challenge FCC decisions but only by asserting injury in fact to its members. *Sierra Club v. Morton*, 405 U.S. 727, 734-35, 739 (1972).

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Finally, I do not believe the reliance upon and quotations from *National Automatic Laundry and Cleaning Council v. Schultz*, 443 F.2d 689, 694 (D.C. Cir. 1971), in the footnote are persuasive. That case was decided prior to *Sierra Club v. Morton* and, in my judgment, is inconsistent with the latter's requirement of injury in fact to organization members. *See* 405 U.S. at 738-40.

APPENDIX B

Filed: March 11, 1975 Docketed: March 12, 1975

United States Court of Appeals

FOR THE NINTH CIRCUIT

WASHINGTON UTILITIES & TRANSPORTATION COMMISSION, *Petitioner,*	
v.	No. 71-2919
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents,*	
DATA TRANSMISSION CO.; NATIONAL RETAIL MERCHANTS ASSOCIATION; THE BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION; MCI CARRIERS; NEBRASKA CONSOLIDATED COMMUNICATIONS; INTER-DATA COMMUNICATIONS; SOUTHERN PACIFIC COMMUNICATIONS COMPANY; WESTERN TELE-COMMUNICATIONS, *Intervenors.*	
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, *Petitioners,*	
v.	No. 72-1198
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents.*	ORDER

Before: BROWNING, WRIGHT, and WALLACE, Circuit Judges

The petition for rehearing is denied.

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APPENDIX C

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	FCC 71-547
	)	63241
Establishment of Policies and	)	
Procedures for Consideration of	)	
Applications to Provide Specialized	)	**Docket No. 18920**
Common Carrier Services in the	)	
Domestic Public Point-to-Point	)	
Microwave Radio Service and Proposed	)	
Amendments to Parts 21, 43 and 61 of	)	
the Commission's Rules.	)	

FIRST REPORT AND ORDER

Adopted: May 25, 1971; Released: June 3, 1971

By the Commission: Commissioner Robert E. Lee concurring and issuing a statement.

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I. BACKGROUND

1. The *Notice of Inquiry to Formulate Policy, Notice of Proposed Rule Making, and Order* in this proceeding (24 FCC 2d 318, released July 17, 1970) was occasioned by a large number of applications by Data Transmission Corporation (Datran), companies associated with Microwave Communications of America, Inc. (MCI carriers or MCI), and others for authorizations to construct microwave facilities to provide specialized common carrier services in various parts of the country.[1] Datran has proposed a switched, all digital network dedicated exclusively to data transmission. The MCI carriers and others all propose point-to-point facilities for private line services including, but not limited, to data transmission. The applications are opposed by established carriers and other related interests, principally by American Telephone and Telegraph Company (AT&T) and The Western Union Telegraph Company (Western Union).[2]

A. Purpose of this Proceeding

2. The *Notice* undertook to resolve in an overall policy and rule making proceeding certain basic policy and procedural questions (see paragraph 17 below) which appeared common to all of the applications and oppositions, prior to consideration of each proposal on its individual merits (*Notice*, paragraphs 3, 23-24). The Commission stated that such action would be conducive to prompt, orderly and efficient disposition of these matters and, in our opinion, would be far preferable to decisions on them

---

[1] At the time of the *Notice*, there were 1713 pending applications for microwave stations. As of March 15, 1971, there are now 33 applicants (of whom 17 are MCI affiliated), making 46 separate proposals and seeking a total of 1877 microwave stations (see Appendix A hereto).

[2] The *Notice* provided for a moratorium of the filing of petitions to deny and other pleadings involving specialized carrier applications pending a further Commission order following consideration of the issues in this proceeding (*Notice*, paragraphs 72, 75).

arrived at in the context of individual proceedings, and/or evidentiary hearings on each set of applications, or even a single, consolidated evidentiary hearing (*Notice*, paragraph 3). We noted that the situation calls for expedition in the public interest, since it is claimed that the proposed services are urgently needed by the public now (*Notice*, paragraph 23). Moreover, these applications are tying up frequencies and may block or affect action on applications of others. We further emphasized that after the broad policy and procedural questions in this proceeding have been decided, there may remain other specific, factual questions to be resolved by appropriate procedures when the applications are processed (*Notice*, paragraphs 3, 24). We stated (paragraph 24):

> Once these issues have been determined, we will consider each proposal on its individual merits and follow such procedures as may be necessary to resolve any remaining questions pertinent to the particular set of applications. Each applicant will, of course, be required to make a satisfactory showing that it is qualified and that the service it seeks to offer is technically and economically sound and would otherwise serve the public interest.

B. Description of Representative Applications and Opposition Pleadings

1. Datran

3. As set forth in the *Notice* (paragraphs 6-9), Datran has proposed a switched, occasional use, all digital communications network specifically engineered for data transmission. The initial system would have 244 microwave stations to serve 35 cities on a backbone route between San Francisco, Los Angeles, Dallas, Minneapolis-St. Paul, Atlanta and Boston. Spur routes from the backbone trunk would provide service to additional cities to accommodate growth in demand for service. The system would utilize

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time division multiplexing (TDM), and be modular in design to facilitate easy and economical extension of terminal capacity. Datran is proposing to provide the local distribution facilities, using a combination of 11 GHz frequencies and multi-pair cable. Space diversity and hot standby transmitters are proposed for increased system reliability.

4. According to Datran, its market studies show that major economic sectors, individual consumers, and providers of information systems and services in the aggregate have a rapidly expanding need for rapid, accurate, low-cost data transmission services which is largely unmet by present common carrier offerings. Specifically, Datran claims that the costs of existing communications services have not declined in proportion to data processing costs; that existing analog transmission systems require costly modulator-demodulator equipment to convert digital signals to analog and back again; that current switched services often take significant time to establish connections, which detracts from the productivity of the data terminal and operator; that transmission systems originally engineered for voice and record transmission do not meet the more demanding reliability standards of digital data transmission; that existing switched services generally cannot handle full-duplex transmission, which leads to reduced throughput and wasteful line reversal time; that the basic switched services, originally intended only for voice and record, provide only two major speed selections whereas many new data applications require faster and more varied choices; that attempts to establish a switched connection for data transmission can be impeded by the high incidence of busy signals currently being experienced in points and times of heavy user concentration; that communication between terminal devices utilizing different line speeds is not possible in most existing major networks; that many data transmissions can be completed in far less than the minimum charge periods now in force; and that while common carriers have recently begun to drop barriers

against sharing and interconnection, much confusion and difficulty continues to exist in user attempts to apply this flexibility.

5. Datran attributes many of the asserted unmet needs of data transmission users to the circumstance that the existing switched facilities of common carriers were originally engineered only for voice and record analog transmission services, a constraint which does not exist in its proposed digital system. The three basic integrated components of Datran's proposed end-to-end system (trunking system, switching system, and local distribution system) are engineered specifically for, and dedicated to, digital data transmission. Thus, a subscriber need not convert his digital signals to a different (analog) transmission mode, since the system transmits the subscriber's signal in its original form. Moreover, as the signal is transmitted through the system, it is continuously regenerated into a new, clean and conditioned signal without the amplified system noise present in analog systems. Datran states that the following features of its proposed systems will meet current and projected data transmission needs which are largely unmet by the existing carrier offerings:

Low cost—as indicated by samples of proposed charges in Exhibit No. 8 to Datran's application

End-to-end compatibility—no analog/digital conversion required.

Rapid connection—connection to be made within 3 seconds after receipt of last destination address indicator

High reliability—no more than one bit error in 10 million transmitted bits

Simultaneous two-way transmission (full duplex)—the proposed system would operate entirely in full duplex mode

Wide selection of switched speed offerings—the initial system would provide 150, 4800, 9600 and 14,400 bits per second switched service

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Low incidence of network busy conditions—a service goal of P.01 providing on an average no more than one busy signal in one hundred attempts

Flexibility to interconnect with and share facilities—Datran proposes to permit ample flexibility for potential users to interconnect user-provided facilities and to share the proposed system among more than one user

Asymmetry—the system will provide capability for communication between all terminals on the network, regardless of their varying transmission needs.

6. Datran further asserts that there is "a need for competition in communications to motivate technological innovations, cost reductions, and efficient allocation of facilities as well as to encourage efforts by common carriers beyond the simple expansion of current networks to meet growing demand." It supports its position with the following contentions: Full realization of the public interest in computer technology requires achievement of appropriate specialized communications services. The users of computer technology are not obtaining adequate service from communications facilities constructed for, and dedicated to, meeting voice and record transmission needs. Effective utilization of existing data processing technology is constrained by present common carrier communications services and facilities, and the design and development of new computer applications requiring data transmission is constrained by high cost as well as unreliable and inflexible service. The public will not realize the full benefits of existing and potential data processing technology until this situation is remedied. The best remedy would be to authorize a versatile, low-cost communications network uniquely structured for digital data communications. Moreover, authorization of its proposed system is likely to

stimulate innovations and to encourage economies by all carriers. A major price paid for monopoly is reduced incentive for innovation. The introduction of competition into the provision of data transmission services to all users will spark further technical developments and spur all common carriers to measure and control costs more effectively in the public interest. If innovation can lower the cost of a service, or provide a better service at the same cost, that service will attract a larger market or create new markets. In addition, the benefits of the regulatory process are most readily obtained when the regulated system's structure, customers, services and costs are easily identified and quantified. Authorization of its proposed system would allegedly encourage economies by all carriers through simplified application of new standards and measures for costs of services.

2. MCI Carriers

7. There are also pending applications by 17 MCI associated companies for portions of a proposed nationwide network to provide specialized private line communications services. The various MCI carriers propose to provide "customized" communications channels, tailored to the exact requirements of subscribers needing interoffice and intracompany communications, to meet newly developing data and specialized communications needs of the public at significantly low cost. The channels would accommodate transmission of data, facsimile, control, remote metering, voice and other forms of communication. The MCI carrier applicants have each submitted market studies for the particular route. Originally, MCI did not propose to provide end-to-end service. It was contemplated that local loop interconnection would be accomplished by the subscriber's private facilities or, for subscribers requiring only voice grade channels, by use of local land-lines of existing telephone companies. MCI has since filed a petition for rule

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making (RM 1700) to allocate the frequencies 38.6-40 GHz for a local Carrier Distribution Service.

8. MCI-New York West's applications will service as a typical example, since it is stated that this "is one of a series of independent MCI-type carriers made up of local ownership interests which will interconnect and cooperate with one another in order to provide a unified, nationwide, customized communications network through arrangements with Microwave Communications of America, Inc." MCI-New York West claims that its proposal offers the following features which are not now available to communications users on existing common carrier facilities:

> Communications channels designed especially for data transmission;
>
> Specified data error rate (1 error in 10^7);
>
> Analog or digital input;
>
> Data channels starting as low as .05 cents per mile per month;
>
> Data channels priced on data speed rather than bandwidth;
>
> One way transmission;
>
> Two-way transmission of different bandwidths;
>
> 138 communications channels ranging in bandwidth from 200 hertz to 960,000 hertz;
>
> Termination of channels in 93 different types, with bandwidth ranging from 200 hertz to 960,000 hertz;
>
> Channels can be terminated into the full single bandwidth of the channel or into a number of subchannels;
>
> Thousands of channel and termination combinations are possible and feasible;
>
> Communication channels start as low as .05 cents per mile per month;

Half-time use;

Sharing of channels;

Use of carrier's facilities for installation of subscriber's private equipment.

9. According to MCI, the "real distinction which delineates MCI service from anything provided today by a existing common carriers is not the facility itself but the manner in which a customer may utilize it in order to provide a customized intra-company point-to-point communications system of his own design and capability." For example, the customer may purchase the exact bandwidth required on a point-to-point basis (including one-way channels), utilize it in whatever transmission mode he chooses (voice or data, alternately or singly), mix different bandwidths on the same channel, use his own terminal equipment and install his own equipment on MCI towers and shelters, provide either analog or digital input signals, and avail himself of MCI's offering of channels designed especially for data use with rates based on transmission speed rather than bandwidth.

10. MCI asserts that a grant of its applications would serve the public interest primarily by affording a flexibility in service needed by, but not now available to, an important communications submarket, and also by causing existing carriers to revise their service offerings and tariff provisions to the benefit of other communications users. Specifically, it claims that a strong need exists now for the type of services proposed by MCI-New York West. It reasons along the following lines: The computer industry "desperately" needs a communications network designed especially for data transmission. MCI would provide this network (accepting both analog and digital data signals) and meet many of the communications needs of the computer industry forecast over the next five years in a study by Arthur D. Little, Inc. Moreover, the economic feasibility of, and

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market for, the proposed operation are demonstrated in a study conducted by Spindletop Research. Industry, business, government and educational entities also require additional communications channels other than those adapted to a communication network designed primarily for voice telephone service. It is essential that these entities have available flexible, low cost communications channels which they can customize to their own particular needs and requirements. The existing carriers serving the proposed routes allegedly do not and cannot readily provide the same type of offering. MCI claims its proposal would provide the benefits of competition in the specialized communications field, stimulate the development of new lines of equipment, introduce new ownership interests in the communications industry, and pioneer new types of communications. It would do so without having an adverse economic impact on the existing carriers or affecting their telephone or private line rate-making principles. There is, MCI says, "a distinct difference between a public telephone service which is a natural monopoly and a customized communications service offered on a private point-to-point basis."

3. Other Applications

11. There are also a number of applicants proposing to provide specialized common carrier services along or near some of the same routes proposed by Datran and/or MCI carriers, and along other routes or with different intermediate points (see Appendix A). While varying in detail, in general all of these applicants — like the MCI carriers — propose to provide specialized private line services tailored to the requirements of the subscriber.[3] Some are already engaged in common carrier or private microwave operations, and propose to make use of such

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[3] Three applicants have applied for systems serving cities solely within the State of Texas.

facilities, personnel and experience to the extent practicable. Some propose to provide "end-to-end" service, either by constructing their own local loop facilities or by negotiating on behalf of subscribers for interconnection with existing local carriers or by some combination of both. Interconnection with facilities of the subscribers and other microwave systems would be permitted. All claim, either on the basis of market studies or their own inquiries, that there is a substantial public need and demand for the proposed services, which are not now provided in the same manner by existing carriers.

4. Opposition Pleadings

12. AT&T states that applications of the type filed by the MCI carriers and others cannot be regarded as an isolated experiment, but rather necessitate a Commission determination of "basic and important policy questions regarding future development of common carrier communications services throughout the United States." In connection with MCI-New York West's applications, AT&T summarizes its position as follows:

> MCI-NY West's proposal and others like it confront the Commission with basic policy questions regarding the future development of common carrier communications services. They would offer to serve only limited segments of business users in certain selected cities, without concern for the deleterious impact this might have on the other business and residential users who are subscribers of the existing common carriers. Such proposals, if granted, would seriously undermine the policy of uniform interstate rates and dilute or delay the benefits that economies of scale would otherwise make available to the general telephone-using public. Moreover, the authorization of such proposals would result in harm-

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ful electrical interference to existing common carrier routes, inefficient and under-utilization of scarce common carrier facilities, to the detriment of the general public. As shown above, there is no demonstrated unfilled public need for MCI-NY West's incomplete and inadequate proposal or for the network of which it would be a part. Existing common carrier facilities are more than adequate to meet the public need and the existing carriers stand ready to serve any additional need which may be found to exist in the future.

13. With respect to Datran's proposed nationwide switched digital network for data transmission, AT&T raises a number of questions which it asserts require hearing. These concern alleged uneconomic duplication of common carrier facilities, impact on nationwide uniform rates, social costs (such as a less efficient total communications network, a requirement for additional Bell System stand-by capacity, intensified congestion of the radio spectrum), the basis for regulating or controlling competition between Datran and established carriers, the extent of public demand for services which is not, or will not be, met by existing carriers, comparative costs and frequency usages, and the technical and economic feasibility of Datran's proposal. AT&T also asserts that Datran's proposal would cause harmful interference to some stations of the Bell System companies, as well as additional cases of potential interference to full development of already established Bell System routes. AT&T takes the position that construction of Datran's proposed system would be more costly than expansion of existing Bell System routes by an equivalent number of circuits, that a grant might lead to the adoption of route pricing by the established carriers and cause an increase in rates to the general public, and that the need alleged by Datran would be better met within its time frame by the Bell System's "evolutionary approach." It is further asserted

that Datran's proposal will depend on intrastate, as well as interstate, service and require appropriate local or state authorization. In addition, AT&T claims that a proliferation of 11 GHz local distribution systems in and around major cities would cause serious frequency congestion problems. Finally, it states that Datran's applications appear to be mutually exclusive with those filed by other specialized common carriers for technical or economic reasons, or both.

14. Western Union urges that consideration of the MCI carrier applications is premature before MCI's already authorized Chicago-St. Louis system has been demonstrated.[4] It requests the Commission to postpone any kind of action on the applications of Datran and other applicants pending a determination of the underlying policy questions, since the proposals "threaten the common carrier communications industry with significant change, if not upheaval." Western Union claims that a grant of these proposals will divert revenues from its prime industrial areas, jeopardize the cost averaging approach, and threaten its efforts to gain a broader economic base and more financial stability. It also claims that the applicants have failed to demonstrate a public need for their proposed services, or to establish their technical and financial qualifications, and that their proposed systems will cause harmful interference to some of its existing stations and prejudice its ability to expand to full band usage on present routes.

15. The applications are also opposed by the General System Telephone Companies (General), other independent

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[4] See *Microwave Communications, Inc.*, 18 FCC 2d 953 (1969); reconsideration denied, 21 FCC 2d 190 (1970); modifications granted, 27 FCC 2d 380 (1971); pending on review in the United States Court of Appeals for the District of Columbia Circuit in *American Telephone & Telegraph Co. et al. v. Federal Communications Commission* (Case Nos. 23959 and 23962).

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telephone companies, and various existing miscellaneous common carriers. In general, they claim that grants would result in wasteful duplication of facilities within their operating territories and/or electrical interference to existing systems. In addition, some of the applicants seek denial of the applications of others on grounds of mutual exclusivity. The National Association of Regulatory Utility Commissioners (NARUC) has petitioned for a public hearing on the Datran applications. Moreover, the Washington Utilities and Transportation Commission opposes the MCI Pacific Coast applications on the ground that any diversion of interstate usage from established carriers to other communications media would have the effect of placing a heavier relative burden on intrastate users of jointly provided facilities.

16. The foregoing is not a complete listing of the applications and opposition pleadings on file, or a comprehensive summary of the individual contentions. However, it will serve to indicate the kind of proposals and objections that led us to institute this proceeding.

C. Issues Posed by the Notice

17. As already stated (paragraph 2 above), the purpose of this proceeding is to resolve certain threshold policy and procedural issues before we process the applications and opposition pleadings on their individual merits and determine whether any further proceedings are necessary on such questions as may remain. The issues to be considered in this proceeding were stated in the *Notice* as follows (paragraph 22):

> A. Whether as a general policy the public interest would be served by permitting the entry of new carriers in the specialized communications field; and if so:

B. Whether comparative hearings on the various claims of economic mutual exclusivity among the applicants are necessary or desirable in the circumstances;

C. What standards, procedures and/or rules should be adopted with respect to such technical matters as the avoidance of interference to domestic communications satellites in the 6 GHz band, the avoidance or resolution of terrestrial frequency conflicts and route blockages both vis-a-vis the facilities of established carriers and among the applicants, and the use of frequency diversity;

D. Whether some measure of protection to the applicants' subscribers is called for in the area of quality and reliability of service; and

E. What is the appropriate means for local distribution of the proposed services?

18. The discussion of Issue A in the *Notice* was posed as a "staff analysis" on which the Commission took no position pending consideration of comments by interested persons (*Notice*, paragraphs 22 and 45b). The staff analysis (*Notice*, paragraphs 25-45a) concluded that a general policy in favor of new entry would serve the public interest because competition in the specialized field appears to be reasonably feasible and can be expected to have some beneficial effects without adverse impact on service by established carriers. Issues B-E were the Commission's proposals, contingent upon adoption of the staff position on Issue A and subject to modification in light of the Commission's resolution of that Issue (*Notice*, paragraphs 22 and 45b). On Issue B it was proposed not to hold comparative hearings on issues of economic exclusivity among the applicants unless there is a much stronger showing of exclusivity than those now before us, and the Commission is

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persuaded that the public interest requires such action in the particular situation (*Notice*, paragraphs 46-50b). On Issue C, the *Notice* proposed to adopt rules governing frequency coordination, the use of frequency diversity, the orientation of antennas, and technical standards for antennas, as well as procedures for processing pending applications involving frequency conflicts with existing stations or those proposed in previously filed applications (*Notice*, paragraphs 51-61). On Issue D we propose to require all carriers providing specialized services to state to their customers and in their tariffs the reliability of the service offered to make refunds where the promised reliability is not met, and to file periodic reports with the Commission concerning the reliability actually achieved, service complaints and refunds (*Notice*, paragraphs 62-65). Finally, on Issue E the *Notice* proposed that new carriers and their customers should have the option of achieving local distribution through interconnection with local telephone carriers or through construction of independent local facilities and, in the latter connection, requested comments on the use of wire, cable, and/or radio — particularly frequencies in the vicinity of 11 GHz or in some portion of the spectrum above 11 GHz, such as 18 or 50 GHz (*Notice*, paragraphs 66-70).

D. Proceedings before the Commission

19. The Commission has received comments from almost 200 interested persons, and reply comments from those most directly concerned (see Appendix B hereto). Oral argument before the Commission *en banc* was heard on January 21-22, 1971,[5] and rebuttal comments to oral argument have been received. A summary of the comments

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[5] The motions of various parties to correct the transcript of the oral argument are hereby granted.

and reply comments on Issues A, B and E by those participating in the oral argument is attached as Appendix C. The rebuttal comments are summarized in Appendix D.

20. The issue engendering the most voluminous and widespread comment is Issue A. All but a very few of the parties commented in support of the staff analysis and in favor of new entry in the specialized field. Those opposed consist principally of the established carriers (AT&T, Western Union, GT&E Service Corp. (GT&E), and United Telephone System (United), United States Independent Telephone Association (USITA), and the National Association of Regulatory Utility Commissioners (NARUC)).[6] The bulk of those commenting in favor of new entry, apart from the applicants, are individual potential users and equipment manufacturers and/or their associations. The Department of Justice and the Small Business Administration also filed supporting comments. The positions of those parties who commented on Issues B-E are indicated in the discussion below.

21. Upon consideration of the entire record, we have decided to spin-off Issues A-C for determination herein and to conduct further proceedings to assist in a resolution of Issues D and E. We shall discuss each of the five issues in order, setting forth: (1) the proposals in the *Notice*, (2) the positions of the major parties, and (3) the basis for our findings and conclusions on the merits or, in the case of Issues D and E, our decision as to the necessity for further proceedings.

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[6] The position of the established carriers is also supported by Eastern Oregon Telephone Company and Consulting Communications Engineers, Inc.

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II. DISCUSSION AND CONCLUSIONS

A. Issue A: Whether as a general policy the public interest would be served by permitting new entry in the specialized communications field.

(1) *Staff Analysis in the Notice*—

22. We set forth our staff's analysis and recommended disposition of this issue in the *Notice* at some length in order to facilitate effective and informed participation by the public (*Notice*, paragraph 22). Moreover, the comments of the parties on this issue are largely directed toward that analysis. Accordingly, in order to place their comments and our discussion in context, we think it worthwhile to repeat verbatim below the reasons given by the staff for its position that new entry would serve the public interest (*Notice*, paragraphs 25-45a):

> "25. In considering whether the public interest would be served by permitting new carriers to provide specialized communications services, the basic touchstone for decision is, of course, the Commission's mandate to regulate 'interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges ***' (Section 1 of the Communications Act). Although this is the first time that the Commission has been presented with a large number of applications for authority to provide competitive common carrier services via microwave in the field of domestic communications, the issue of competition is not new. The Commission has had numerous occasions to consider and establish policy with respect to the

provision of communications services in the common carrier field on a competitive basis.

"26. As long ago as 1948 applications were filed in Docket No. 8777 by Mackay Radio and Telegraph Company, a predecessor company to ITT World Communications, Inc. (ITT) for authority to operate circuits to Finland, the Netherlands, Portugal and Surinam in competition with pre-existing circuits to those points operated by RCA Communications, the predecessor to RCA Global Communications, Inc. (RCAC). Upon review of the Commission's decisions[5] to grant the applications for Portugal and the Netherlands and deny the Surinam application (Finland was withdrawn), the Supreme Court held:[6]

> "(a) The Commission may not grant applications to provide a competitive service merely because it assumes 'that competition is bound to be of advantage in an industry so regulated and so largely closed as this one . . .'
>
> "(b) The Commission may grant applications for competitive circuits after an analysis of the trends and needs of the industry[7] and in the exercise of 'the discretion given it by the Congress.'[8]
>
> "(c) 'In reaching a conclusion that duplicating authorizations are in the public interest wherever competition is reasonably

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[5] FCC 51-197; see also FCC 55-698.

[6] *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953).

[7] Id. page 97.

[8] Id. page 95.

feasible the Commission is not required to make specific findings of tangible benefit."[9]

"(d) In order to grant a competing application, 'the Commission must at least warrant, as it were, that competition will serve some beneficial purpose such as maintaining good service or improving it.' An applicant is not required to demonstrate tangible benefits. There must, however, 'be ground for reasonable expectation that competition may have some beneficial effect."[10]

"26a. Since the Supreme Court's decision in the *RCA* case, the Commission has granted authority for numerous competing direct radio telegraph circuits,[11] in certain instances without holding hearings. The Commission has also followed a similar policy with respect to the grant of competing applications to miscellaneous common carriers in the domestic communications field. In each instance the test was whether the competition was reasonably feasible and could be expected to have some beneficial effect.[12] In addition, the Commission has authorized the use of

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[9] Id. page 96.

[10] Id. page 97.

[11] See, e.g., 26th Annual Report of the FCC, page 107. The Commission has also authorized competing international carriers to lease, or obtain indefeasible rights of use of, channels in international cables of AT&T. See, e.g., 28th Annual Report of the FCC, pages 124-125.

[12] The Commission in *Mackay Radio and Telegraph, Inc.*, 15 FCC 690 at page 737, defined 'reasonably feasible' as encompassing the concept that the applicant seeking to compete must demonstrate: that a

(continued)

private microwave systems,[13] by entities to satisfy their own needs. This also introduces an element of competition in the sense that a potential user now has the alternative of leasing facilities from a common carrier or providing his own facilities.

"27. We note that there are not numerous precedents in the general domestic common carrier service field for the authorization of competing circuits. This is due primarily to the fact that until the filing of the applications considered in Microwave Communications, Inc., 18 FCC 2d 953 (1969),[14] reconsideration denied 21 FCC 2d 190 (1970), the Commission had no occasion to consider applications for competitive service in this area. In its *MCI* decision, the Commission granted applications of MCI to provide specialized interstate common carrier services between Chicago and St. Louis upon a finding that competition was reasonably feasible and could be expected to provide some public benefits. While not determinative of issues posed by the instant applications, the *MCI* decision indicated a disposition to foster in the specialized

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[12] (continued)
grant of its application would enhance or induce competition; and that a grant of its application would not endanger the ability of the existing carrier to continue to provide competitive service to the points at issue or to other points of its services. Specifically, the Commission was concerned as to whether there was a sufficient volume of traffic available to support both services. The presence of such a volume of traffic was taken as an indication that competition was reasonably feasible.

[13] *In the Matter of Allocation of Frequencies in the Bands Above 890 Mc.*, 27 FCC 359 (1959), 29 FCC 825 (1960).

[14] See footnote 4.

communications field a competitive environment within which users may have a wider range of choices as to the means of satisfying their special communications needs.

"28. The public interest would be best served by allowing the entry of new communications common carriers to serve the markets for special communications services, to the extent that such entry can be accommodated within the limitations of radio frequency availability. For the reasons set forth below, competition in this area meets the long-established test, i.e., that it is reasonably feasible and can be expected to have some beneficial effect. Indeed, the advantages of such a policy appear to be manifold and to outweigh any risk that the public interest would be adversely affected.

"29. The demand for all types of communications service is growing very rapidly. The use of standard voice communications services is expanding at very high rates and it is expected that this rapid growth will continue, if not increase.[15] In addition, data communication, which has been in an embryonic stage of development, will probably exhibit very substantial growth over the next decade.[16] In proposing a policy favoring

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[15] About 87 percent of the Bell System's interstate revenue is from message toll telephone and wide area telephone service, and these services have an annual growth rate of 15 percent. It has been estimated that the existing plant of the Bell System will quadruple by 1980. See Statement of R.R. Hough, Vice-President, AT&T, before the FCC during continuing surveillance meetings, week of September 8, 1969.

[16] In its report to the Commission in the computer inquiry (Docket No. 16979) Stanford Research Institute estimate that by 1980 10-50 percent of the Bell System plant may

(continued)

the entry of new specialized common carriers, we look toward a degree of competition oriented toward the development of new communications services and markets and the application of improvements in technology to changing and diverse demands. Thus, we are not faced with the question of whether we should increase the number of carriers which are to serve a fixed market with the same services, as is implied by many of the arguments raised by the established carriers. Rather we anticipate that the new carriers would be developing new services and would thereby expand the size of the total communications market. There may well be realignments of customers for specific services in accord with the types and degrees of specialization provided by different carriers. But any loss to the established carriers can be expected to occur only in terms of their relative share of the total communications market which would be served and not in terms of the volume of communications provided. Since the total communications market being served is likely to be increased, the existing carriers' volumes of traffic may increase at the same time that there is entry by the new carriers.[17] Moreover,

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[16] (continued)
well be serving date users (as measured in terminal hours). However, AT&T estimated that by 1980 data use will amount to only 5-10 percent of the peak network load.

[17] We note that despite the claims of potential adverse effects upon the established carriers that were made in the Carterfone case (13 FCC 2d 420), AT&T Chairman Romnes stated in the 1968 Annual Report (page 4):

> 'Since customers now have more options in using the network, this should further increase

(continued)

the filings before us indicate that the special service markets are quite different from the standard toll telephone service. The existing communications network was established to meet the requirements of voice transmissions in a market where consumer demands were generally similar. However, data users require not only a different application of communications technology, but also have requirements for services that are heterogeneous in character. For example, Datran proposes to construct digital technology transmission systems especially to meet data requirements. Other applicants, while proposing to use analog transmission techniques, propose to offer services with systems more closely designed to the requirements of transmitting digital and other non-voice traffic. The applicants would be able to use systems that have not been engineered around the specialized requirements of voice traffic (such as sensitivity to steady line noise but relative insensitivity to impulse noise and phase distortion). Some may even offer systems totally optimized to the requirements of data transmission or other specialized traffic. In summary, the diversity that characterizes both the demand and the technology supports our conclusion that new entry in this field is reasonably feasible.

"30. There appears to be an increasing public need and demand for the availability of diverse

[17] (continued)
usage and enhance the growth of our business. Competition in providing communications equipment that may be connected to the network will no doubt accelerate, but we are confident of our ability to meet the tests of the market. In the expanding structure of communications there is opportunity for all.'

and flexible means for meeting heterogeneous communications requirements. Furthermore, the means for satisfying such needs are becoming available through rapid developments in communication, computer and related technologies. The information before us affords grounds for a reasonable belief that there is a substantial public need for the proposed services which is not now being adequately met by the established carriers. The computer inquiry showed that there was dissatisfaction on the part of the computer industry and by many data users who had been attempting to adapt their requirements to existing services.[18] Datran has persuasively stated the public need for rapid, accurate and low-cost data transmission, the drawbacks in using existing facilities engineered for a voice and record transmission, and the advantages of a switched, all-digital network with end-to-end compatibility (see paragraphs 7-9 * * * [of the *Notice*]). Moreover, the showings in the MCI applications (e.g., the Arthur D. Little and Spindletop studies) support the view that there is widespread interest in the types of specialized, private line services proposed by it and other applicants. The circumstance that so many applicants apparently believe that there are markets to be developed is also of some significance. By permitting the entry of specialized carriers, we would provide users with flexibility and a wider range of choices as to how they may best satisfy their expanding and changing requirements for specialized communication service.

[18] For a summary of the responses of the computer industry and data users, see Report No. 2 of the Stanford Research Institute study in the computer inquiry (Docket No. 16979).

"31. We note in this connection that the applicants are in a disadvantageous competitive position vis-a-vis AT&T insofar as prompt inauguration of the proposed services is concerned. Action on their applications may be delayed for some time by the necessity of resolving claims in petitions to deny, *inter alia*, that the showing of need is inadequate. Since AT&T has numerous long line facilities, both cable and radio, and many diverse routes, it generally has enough flexibility and spare capacity to institute new services (at least on a limited scale) without having the immediate necessity of obtaining authorization for new or modified facilities. Therefore, AT&T need only file a tariff in order to commence providing service on its authorized facilities. AT&T is thus in a position to offer at any time services with many of the features proposed by the applicants, while challenging the showings of need made by would-be new entrants and claiming that hearings are required on their proposals.

"32. There is also a question as to whether the existing carriers can meet the requirements in the specialized markets promptly, efficiently and effectively without prejudice to full and timely satisfaction of the increasing requirements of the public monopoly services. The responsibility for meeting the nation's growing and changing communications requirements is now largely concentrated in the Bell System. This responsibility is becoming more and more difficult to discharge in a manner which enables the Bell System to satisfy timely and effectively all existing and anticipated communications requirements. This is partly because of the diversity of such requirements, the

obvious problems of designing and engineering facilities capable of meeting all such requirements with equal efficiency, economy and expedition, and the huge and increasing amounts of new capital that the Bell System must raise for construction purposes. The entry of new carriers would have the effect of dispersing somewhat the burdens, risks and initiatives involved in supplying the rapidly growing markets for new and specialized services among a multiplicity of entrepreneurs who appear ready, willing and able to assume these undertakings. It would also expand the capability of the communications industry to respond to the challenge of meeting and rapidly growing and varied demands of communications users.

"33. AT&T claims that the entry of specialized carriers will result in the sacrifice of economies of scale and the incurrence of social costs. However, the achievement of any economies of large scale supply in particular facilities may be at the expense of potential economies in other directions. In order to realize large scale economies, a single supplier must conglomerate diverse functions and provide general standardized services, thereby foregoing potential economies of specialization that could be derived from serving a specialized portion of the market. During an era of relative stability in technology, characterized by markets with homogeneous demands, the efficiency of large scale, single supply is necessarily considerably greater than it is during an era of rapidly changing applications of improved technology and growing potential markets made up of diverse consumer demands. Any attempt to adapt facilities designed primarily to meet voice

requirements to the quite different requirements of data communications may entail such compromises in service as to leave both types of users dissatisfied,[19] and may vitiate the economies of scale the carriers postulate.

"34. Further, while economies of scale may result when large general purpose transmission facilities can be used to meet relatively homogeneous communications requirements, there may be other drawbacks. The sheer size of the AT&T organizational structure, its enormous financing requirements, its vertical integration, and near monopoly position in the provision of communications services may make it slower to perceive and respond to individual, specialized requirements and to initiate market and technical

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[19] AT&T, in effect, recognizes some shortcomings in the use of voice oriented facilities for data mission in that it is gradually working toward digital transmission with the 'evolutionary approach' necessitated by its existing plant. As Datran points out, it apparently recognized this need some time ago. An article entitled 'Transmission Aspects of Data Transmission Service by Using Private Line Voice Telephone Channels' in the Bell System Technical Journal, November 1957, states that:

> 'The telephone network was developed for speech transmission, and its characteristics were designed to fit that objective. Hence it is recognized that the use of it for a distinctly different purpose, such as data transmission, may impose compromises both int he medium and in the special service contemplated.'

See also, 'Transmission Across Town or Country,' Bell Laboratories Record (May/June 1969), pages 162, 167, to the effect that the use of digital transmission for voice may be more costly than analog transmission.

innovations.[20] Competition in the specialized communications field would enlarge the equipment market for manufacturers other than Western Electric, and may stimulate technical innovation and the introduction of new techniques. Moreover, new carriers with smaller scale operations could devote their undivided attention to the particular needs to be served and, lacking a captive market, would be under pressure to innovate to produce those types of services which would attract and retain customers.

"35. In an industry of the size and growing complexity of the communications common carrier industry, the entry of new carriers could provide a useful regulatory tool which would assist in achieving the statutory objective of adequate and efficient services at reasonable charges. Competition could afford some standard for comparing the performance of one

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[20] In its report and Order relating to the establishment of domestic communication-satellite facilities by non-governmental entities, Docket No. 16495, March 24, 1970 (22 FCC 2d 86), the Commission took note that 'AT&T has stated that views satellite transmission is another form of transmission similar in function to terrestrial microwave systems and coaxial calbes, and the there are no communications services which could be offered by satellites which cannot now be offered by terrestrial facilities.' (Paragraph 26, footnote 7) However, the Commission observed that:

> 'The most important value of domestic satellites at the present time appears to lie in their potential for opening new communications markets, for expanding the beneficial role of competition in the existing markets for specialized communication services, and for developing new and differentiated services that reflect the special characteristics of the satellite technology.' (Paragraph 25)

carrier with another. Moreover, competitive pressure may encourage beneficial changes in AT&T's services and charges in the specialized field, and stimulate counter innovation or the more rapid introduction of new technology. The Commission noted in its *MCI* decision the apparent response of AT&T to MCI's proposal in modifying certain of its sharing provisions of its private line tariff offerings (18 FCC 2d 953, 961-2).

"36. We are not persuaded that the allegation of cream skimming' is well-founded or would justify a bar against new entry of the type proposed here. The concept of cream skimming assumes that the total potential market that could be served is actually being served by the established carriers and that they are responding to all changes in demand and technology at an optimum rate. It postulates that there is no room for a potential entrant without giving him part of the existing market and the only attraction to the potential entrant is the existence of the cream on the low cost routes. But it appears that the principal attraction for the new applicants here is not the cream of the existing markets, but rather special service markets that have not been developed. As earlier mentioned, the entrants seek to expand the size of the total communications market in a manner that may benefit all communications users.

"37. Further, the development of new markets must always take place gradually and begin in those particular sub-market areas where maximum demand can be stimulated at minimum cost. This is the manner in which all new products and services are introduced, and it

is practiced by the established carriers. When AT&T developed its audio and video services during the 1948-58 period, it chose to serve only the larger population centers and not outlying areas. As a result the Commission authorized intercity relay facilities to broadcasters and to miscellaneous common carriers. More recently, AT&T claims that the costs of high capacity microwave and cable facilities used between major cities justify its experimental Series 11,000 tariff which is applicable only between large cities. Further, AT&T originally proposed plans to introduce interstate Picturephone service initially only between Pittsburgh's Golden Triangle area and lower Manhattan.[21]

"38. Though claiming that the geographical scope of the applicant's proposals is too small,[22] the established carriers have not elected to specify any additional locations needing the proposed services at this time. The proposals now before us cover large sectors of the country, much larger than one might expect in initial proposals. Datran's proposed initial network is limited to 35 markets where the level of maturity of digital technology has created the greatest initial requirement for data transmission. However, it states that it plans ultimately to expand the system to serve all significant interstate as well as intrastate data transmission markets, 'including

[21] AT&T has since requested dismissal of its applications for authority to provide such service. However, it is offering Picturephone service in Pittsburgh.

[22] We note that the carriers cannot consistently claim both that there is no need for these specialized services and that the geographical scope of applicants' proposals is too small.

residential subscribers as digital technology is extended to the home.' As Datran points out, business and other institutions, rather than individuals, presently constitute the overwhelming majority of potential data transmission users and they are heavily concentrated in major metropolitan areas. We would not expect a system such as that proposed by Datran to be constructed on a total nation-wide basis at one time, though we would anticipate orderly expansion and development of communications plant to meet evolving market demands.[23] Moreover, the combined routes of the applicants proposing specialized, private line services appear to cover the bulk of the major cities where customers for such services are apt to be concentrated, and they are proposing interconnection. We can reasonably expect applicants to propose extensions of their systems as their markets develop, and there is no indication of a cessation in the filing of new applications for special services in additional areas. Competition in the response to these new demands may result in much faster geographical extension of the services than would be the case if all markets were preserved for the established carriers. Finally, other customers could be reached by spur routes from these networks as demand develops, pursuant to Commission action under Section 201 (a) and 214 (d) if necessary in the public interest.

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[23] Indeed, the Bell System and Western Union began on a modest basis and gradually evolved to their existing positions. Moreover, while the Bell System serves the bulk of the nation's population, it dos not serve most small towns and rural areas.

"39. Assuming that the questions of interference and frequency blockage are satisfactorily resolved (see paragraphs 54-58 * * * [of the *Notice*]), we see no real basis for the asserted fears that the authorization of specialized systems would affect rates for existing common carrier services or delay the planned construction of high-capacity systems in this decade. Preliminarily, we note that there appears to be a basic inconsistency between the claim of adverse impact and the contention that there is no public need for the proposed services. Clearly, if the applicants are unable to attract subscribers because their needs are being fully and satisfactorily met by established carriers, there can be no adverse impact. On the more reasonable premise that unmet public need exists, some diversion of existing and potential traffic may occur. On the other hand, the stimulative effect of the specialized services may actually increase the amount of traffic being carried by the established carriers (see para. 29). Moreover, to the extent that they provide local distribution service as proposed by some of the applicants, established carriers would also realize an increase in business. Established carriers would, of course, be free to compete on equal terms with the new entrants and might obtain a very substantial portion of the specialized communications market.[24] Indeed, their established position and the fact that they already provide various communications services to potential customers for the specialized services could very

[24] A representative of Datran has stated that it expects to obtain only about 10 percent of the data market by 1980 (see *Telecommunications Reports*, Vol. 36, No. 20 (May 18, 1970), page 5).

well afford them a competitive advantage over newcomers to the field (see also paragraph 31 above).

"40. It is important to recognize that we are concerned with only a relatively small percentage of established common carrier service to the public.[25] For example, AT&T's present interstate business constitutes only about 30 percent of the Bell System's total business; about 87 percent of the interstate revenue is from message toll telephone and wide area telephone service (WATS), and these latter services have an annual growth rate of about 15 percent.[26] None of the applicants proposes to provide this type of service and we see no reason to expect any undesirable effects upon these services. An examination of AT&T's private line, program transmission and other more specialized services indicates that an estimate of the proportion of AT&T services that is vulnerable to competitive in-roads would be on the order of 2-4 percent of its existing total business. Moreover, it has been estimated that the

[25] All of the applicants propose interstate facilities and services except three applicants in Texas, which, we understand, does not require state certification for intrastate service. Applicants proposing to operate where state or local authorization is required for intrastate service must, of course, obtain the necessary authorization prior to engaging in such service, and where proposed facilities are justified on the basis of intrastate service, local or state authorization must be obtained prior to the filing of microwave applications (see Section 21.15 (c)(4) of the rules).

[26] However, the telephone facilities may be used for the transmission of date (*e.g.*, Datephone). It has been estimated that about 200,000 of the present approximately 96 million telephones are Dataphones. The use of Dataphones is expected to increase.

existing plant of the Bell System will quadruple by 1980.[27] Thus, it is difficult to see how a diversion (if, indeed, there is any diversion) of some portion of that comparatively small percentage of total business represented by interstate specialized services would have any substantial effect on telephone rates and service or delay or preclude whatever expansion of facilities is needed to accommodate the rapid growth in telephone traffic. In light of this and the estimate of AT&T that by 1980 data will amount to only 5-10 percent of its peak network load, we cannot find merit in the argument that the high-capacity facilities which AT&T plans for the next decade are in any substantial or relative measure dependent upon a very substantial growth in data and specialized private line services of AT&T, far exceeding existing percentages, and would be made possible only by a denial of the applications before us.[28] Similarly, nothing before us warrants a conclusion that the uniform tariff policies of the established carriers would be endangered. It has not been shown that the rates of the new entrants would in fact be lower than Bell could justify with its uniform charging approach or that there is any real threat to the rates of the established carriers. In the event that adverse consequences to the public should develop, the Commission can take such action on the relevant tariff filings as may be necessary to protect the public. We think that in

[27] See Statement of R.R. Hough, Vice-president, AT&T, before the FCC during the continuing surveillance meetings, week of September 8, 1969.

[28] As earlier indicated (footnote 16 above), AT&T has estimate dthat by 1980 data will amount to only 5-10 percent of its peak network load.

the context of the matters now before the Commission involving proposed new and different services, a question of this nature is more appropriately considered in connection with the tariffs rather than upon authorization of the facilities.

"41. In addressing the question of pricing practices we must not overlook the possibility that the converse situation may arise. We refer to the possibility that the established carriers may file unduly low or discriminatory tariff schedules and thereby subject the new entrants who increase the competitive character of the market to unfair competition. In this connection we note that AT&T could file tariffs which price its potentially competitive services below cost to prevent or limit entry and seek to recover the losses through cross-subsidy from its monopoly message toll telephone and WATS market. The Commission has already addressed itself to this problem by undertaking an examination of ratemaking principles in Docket Nos. 16258 and 18128. See also the Commission's Report and Order in the domestic satellite proceeding (Docket No. 16495), 22 FCC 2d 86, 96. The Notice of Proposed Rule Making in Docket No. 18703 (FCC 69-1140) looks toward an expansion of the scope of information available to the Commission at the time of proposed rate changes or new services by any major carrier. In addition, the Commission is expected to address itself further in the near future to this problem and to explore the feasibility of establishing ratemaking standards which would identify cross-subsidization as well as policies directed to their prevention or elimination.

"42. We turn now to a consideration of the other established carriers. First, there are the independent telephone companies. These are not engaged to any substantial degree in providing either interstate data or specialized private line services. Instead, for the most part, they are engaged in the provision of local exchange and other local services. They participate in interstate service primarily for the provision of the local distribution facilities. Under these circumstances it is difficult to visualize how they would be affected adversely by a grant of the pending applications. In fact, to the extent that these applicants rely upon or use existing local distribution facilities, their entry would increase the business of the independents.

"43. The situation in the case of Western Union is different. Its revenues from leased systems and Telex account for about 30 and 15 percent, respectively of its total revenues, with the remaining 55 percent coming from message telegraph service and other services. The potential impact upon Western Union is therefore greater than upon either the Bell System or the independents. Such potential impact must, however, be evaluated in the context of the overall public interest. First of all, as already set forth in detail, we are here concerned with the sharing of a new, relatively untouched market in a field where even the present demand is growing at a very rapid rate. Secondly, the proposed services are designed to meet demands not being satisfied by the current services of the established carriers. Moreover, we believe that this market will best be served by a competitive service of supply. Thirdly, we are primarily concerned with the provision of

interstate facilities. In this connection, we note that Western Union for the most part does not use its own facilities, but instead acquires them largely by lease or rental from AT&T. In fact, there is no established pattern for the installation of new facilities by Western Union other than its recently filed applications for facilities over a route from Cincinnati to Atlanta. Finally, the Commission has just announced that it has instructed its staff to prepare a decision approving Western Union's application to purchase the Bell System TWX system with estimated annual revenues of $86,000,000 for 1971. This in itself should, if the transaction is given final Commission approval, increase Western Union's annual revenues materially. In view of all of these factors, it is our conclusion that additional competition is reasonably feasible and that the foreseeable public benefits from the new services set forth above (see paragraphs 30-35) far outweigh the potential dangers to Western Union. In any event, there is no substantial showing that a grant of the applications would deprive the public of any services provided by Western Union which it is now enjoying and there are very substantial grounds for finding that numerous benefits in the way of new, different and less expensive services would result from a grant of the pending applications.

"44. The most important safeguard, however, is the fact that the Commission has ample power under the Communications Act to take such regulatory action as may be necessary in the public interest to avoid adverse impact on the achievement of statutory goals and, particularly, the basic purpose stated in Section 1 of the Act.

The Commission would, of course, not permit any degradation in overall services to the public or any impediment to the realization of their development. The results of any authorizations would be the object of close and continuous scrutiny by the Commission. Should adverse consequences develop or appear imminent, the Commission can take such remedial action or precautionary measures as may be necessary to protect the public. As indicated, appropriate action can be taken in connection with the tariffs. In addition, any renewal of license for the proposed facilities would require a public interest finding, and could be subject to any needed conditions. Moreover, the Commission's broad rule making powers are always available. Finally, we do not contemplate any protective umbrella to shield the competitors, except from pedatory pricing and other unfair anti-competitive practices, or any artificial bolstering of operations that cannot succeed on their own merits.

"45. In short, we have an opportunity now to see if the benefits that may reasonably be anticipated from entry of new carriers in this narrow field will in fact materialize. We can do so at what appears to be minimal risk. If we fail to explore this opportunity, the present situation in which one carrier dominates the entire domestic communications scene will continue indefinitely, and we are unlikely to know what the public may be missing. On balance, we think that the better course in the public interest is to apply long standing precedent to the area of domestic microwave services and to open the door to realization of the possible advantages while keeping a watchful eye to avoid any adverse effect.

"45a. Accordingly, inasmuch as it appears that additional competition is reasonably feasible in this burgeoning market and that the entry of new carriers may be expected to benefit the public by providing new and differentiated services, there is no need to designate the pending and anticipated applications for hearing on the broad issue of whether the public interest would be served by competition to the established carriers in the provision of specialized services or on the related contentions with respect to alleged duplication of facilities, the general question of the need for the new services and impact on uniform tariff policies and existing services. Interested persons may make as full a showing as they desire on this aspect in their comments in this proceeding, and the Commission will, of course, carefully consider all material submitted in arriving at policy determinations. However, we do recommend that the policy decisions made in the proceeding should be dispositive of such questions for purposes of these applications, in the absence of unusual and distinguishing circumstances."

(2) *Positions of the Parties:*

Established Carriers —

23. The established carriers (principally AT&T and Western Union)[7] do not purport to be opposed to com-

[7] The position of AT&T and Western Union is also supported by GT&E Service Corp. (GT&E), United Telephone System (United), the United States Independent Telephone Association (USITA), the National Association of Regulatory Utility Commissioners (NARUC), Eastern Oregon Telephone Company and Consulting Communications Engineers, Inc. We note, however, that International Telephone and Telegraph Company (ITT) commented in support of new entry.

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petition *per se* but urge that rule making is an inappropriate procedure for resolving the policy issues involved in new entry, both as a matter of law and of sound regulation. They assert that the staff analysis rests on untested and unsupported assumptions, and that evidentiary hearing is required to compile a full record and to afford an opportunity for cross-examination — particularly as to the applicants' market studies and showings of need. AT&T would settle for a single, nationwide evidentiary hearing whereas Western Union seeks multiple hearings on regions or individual routes.

24. For a more detailed description of AT&T's contentions, see Appendix C, pages 18-24, and Appendix D, pages 8-9. Very briefly, AT&T asserts that the staff analysis has an inadequate basis and rests upon untested and unsupported assumptions that: the new entrants would provide new services (which the established carriers do not, or could not in the future, provide) and expand the size of the total communications market, that there is a burgeoning market sufficient to support indiscriminate entry of new specialized carriers, that there would be no effect on the ability of existing carriers to continue to realize declining unit costs, that there would be no impact on nationwide average rates, and that competition would spur innovation and the introduction of new technology.

25. AT&T claims that there is no evidence as to the need for additional carriers, that it is not sufficient to rely on the Computer Inquiry and the market studies of the applicants, that it is erroneous to compare the proposed services with existing offerings since as public need develops, the existing carriers will meet it. It further asserts that the gist of the applicants' proposals is lower rates, whereas the real consideration should be lower costs. There are no facts before the Commission to establish that the Bell System has been unresponsive to data needs, or that the applicants would provide services as efficiently and economically as the Bell

System. The existing structure of the communications industry has served the country well, and the Bell System is responsive to new and emerging service needs including data (as shown by Appendix C to its comments, Appendix A to its reply comments, and its plans to complete construction of a digital data network for 60 cities by 1975).

26. In addition, AT&T claims that the staff analysis does not adequately consider the effect of new entry on telephone users. It states:

> The impact of such a departure from well-established policy on quality and adequacy of the national telecommunications network, the services it provides, the declining unit costs realized and to be realized by the existing carriers, uniform nationwide rates, the pace of technical and service innovation, national security and efficient spectrum utilization — all matters of vital importance to users in general — would, we believe be substantial and cannot be ignored.

27. In the event that the Commission should authorize new entry, AT&T urges that every carrier (including AT&T and Western Union) should be able to compete fully under explicit ground rules set forth by the Commission. It agrees that there should be no cross-subsidization or temporary price cuts. However, AT&T should be permitted to depart from its nationwide rate structure where that practice inhibits its ability to compete effectively. Long-run incremental costs should be the cost criterion for pricing competitive services, and there must be no protection of inefficient specialized carriers who have no economic basis for survival.

28. For a more detailed summary of Western Union's position, see Appendix C, pages 25-29. In brief, Western Union urges that the Commission is required, as a matter of law and sound regulation, to appraise the consequences

of increased competition by new carriers in evidentiary hearings involving particular geographic areas and the specific services for which licenses are sought. There is an expanding market for communications services, including data communication, but this market is not unlimited, is not growing at the same pace in various markets throughout the country, and its contours cannot be determined at this point in time. Evidentiary hearings are required by applicable law, for the Commission cannot by rule decide such adjudicatory issues as the nature and extent of the public need for particular services in a particular geographic area, the extent to which existing carriers will be injured in a given area by a particular type of new specialized service, or the relative benefits and burdens to the public on a particular route with respect to the particular communications service. Moreover, the staff analysis is based on multiple assumptions, none of which is supported by evidence or could be supported as a generality covering the entire nation and all possible forms of specialized communications services in all markets.

29. In addition, Western Union claims that the new entrants would be competing primarily among themselves and with Western Union, rather than with AT&T. Western Union states that its message telegraph service is a "profitless monopoly" and that 44% of its revenues and the bulk of its profits are derived from leased systems and Telex service. New entrants can be expected to divert substantial revenues from Western Union without compensating public benefits and such diversions would be particularly heavy initially, as a new entrant would almost certainly offer low rates in an attempt to obtain traffic. The result of a price war would be to weaken Western Union and reduce its ability to compete effectively with AT&T. Western Union claims that it is the only carrier with resources to provide effective competition to AT&T, and that

new services cannot compensate for the loss or severe weakening of its service. If new entry is authorized, Western Union must be permitted to compete effectively and to offer its services at rates competitive with those of the new entrants. The Commission should declare that such rates are lawful, being based on competitive necessity, provided only that they do not burden a carrier's other customers.

Applicants —

30. The applicants argue, with Department of Justice support (Appendix C, pages 32-36), that the rule making approach is entirely appropriate, in the public interest, and in accord with applicable legal and statutory authorities, Commission precedent in comparable situations, and the practice of other administrative agencies. They urge that the staff analysis comports with the *RCA* test, and is well-founded. They further claim that there is abundant warrant in the record and other material officially before the Commission for a finding that new entry in the special service market is reasonably feasible and can be expected to have some beneficial effects without adverse impact on established carriers. Their comments, which are summarized in Appendix C, pages 1-17, 42, and Appendix D, pages 1-8, are briefly highlighted below.

a. Potential market and public need and demand for the proposed services —

31. The MCI carriers state that the need and potential demand for the proposed services is evidenced by the record in the *MCI* case, the record in the Computer Inquiry (Docket No. 16070), and independent studies for the MCI carriers made by Spindletop Research Center, Arthur D. Little & Co., and Technical Communications Corp. in connection with the pending applications. They further point to Executive Branch reports favoring new entry, and com-

ments by potential users and other members of the public in this proceeding.[8] Appended to MCI's reply comments are representative views of 93 Respondents expressing interest in the proposed services and/or some dissatisfaction with existing services of the Bell System (MCI Reply Comments, Appendix A) and excerpts from current technical publications dealing with the crisis in business and data communications (MCI Reply Comments, Appendix B).

32. The Datran filing contains an extensive discussion of its market study of the data transmission needs of seven major representative segments of the economy (securities, insurance, manufacturing, retailing, banking and finance, information systems and services and health care). Datran urges that the projections and other information presented in its comments (see Appendix C, pages 8-10) represent a meaningful analysis of the current and expected data communications market, and establish conclusively that the market for such services can be expected to swell very significantly over the next decade. Applicant Southern Pacific Communications Company relies on its own market studies and on additional market research studies made on its behalf by Computer Sciences Corporation which indicate substantial immediate demand and potential growth on its proposed routes (see Appendix C, page 14). It also relies on the comments and oral argument of its would-be customer, Greyhound Corporation (see Appendix C, pages 40-41). Nebraska Consolidated Communications Corporation, an applicant formed and one-third owned by independent telephone companies, relies on an independent study by Arthur D. Little, Inc. and its showing of 50 or more potential customers in its applications. Nebraska Consolidated states that two of these are "firm, letter-of-intent customers" who by themselves would provide annual

[8] At oral argument MCI stated that it relies especially on the comments of the Federal Home Loan Bank of Des Moines (Transcript of Oral Argument, pages 13-14).

revenues of $894,196 with a potential for significant increase (see Appendix D, pages 6-7).

33. The applicants further claim that the potential market is largely undeveloped at present and would be stimulated by new entry and various features in their proposals not presently offered by established carriers. MCI urges that its proposed "customized" or "individually tailored" private line services would offer customers the flexibility and benefits of private microwave at lower cost to the user, *e.g.*, the exact bandwidth required for any particular service, any bandwidth that is required, and flexibility in the use of channels and customer terminal equipment. Datran claims that for data communications to reach their full potential, additional data transmission facilities with the features proposed by it are essential. Datran asserts that the most prevalent problems with present carriers are: excessive costs, lack of carrier responsiveness, inadequate field services, and poor facilities performance (see also, paragraph 7 of the *Notice*). The improvements offered by its proposed all-digital switched network exclusively for data are: lower cost, rapid connect, high availability, full-duplex switched service, end-to-end compatibility, wider selection of speeds, improved accuracy and reliability, better planning guides and counselling, faster and more reliable installation, more responsive and capable maintenance and repair, and greater flexibility in modifying or configuring services to meet specific needs. Datran further asserts that AT&T is estopped from claiming there is no need for an all digital switched network for data transmission, in view of its own plans to institute such a network in the mid-1970's.

b. Impact on established carriers—

34. MCI states that the lack of any substantial potential impact on AT&T is established by statistics taken from AT&T's annual reports to the Commission. In 1969, total

revenues for the Bell System were $16.1 billion. Projected total revenues for all MCI carriers are approximately $55 million per year.[9] The compounding effect of AT&T's 1969 rate of circuit growth (12-13 percent) would give it slightly over one million interstate circuits in 1980 — almost a four-fold increase over the 294,032 interstate circuits in 1969. The bulk of Bell's revenues is derived from its switched voice telephone service —a rapidly growing field the applicants do not propose to enter. In 1969, AT&T's reported revenues from toll private line services (excluding video) accounted for only $561,261,383 or 3.5 percent of its total operating revenues of $16.1 billion. MCI's total projected yearly revenues would amount to only a small percentage of that small percentage of total Bell revenues. In 1969, it appears that data transmission accounted for only approximately $267.5 million or 1.7 percent of Bell's total revenues. Even assuming the unlikely event of a total diversion of such revenues, the effect would be minimal and would not adversely affect the construction of new facilities needed for AT&T's rapidly growing basic telephone service, declining unit costs, or nationwide rate averaging for telephone users. Moreover, the applicants are seeking primarily to serve a potential specialized market which is largely yet to be developed, and AT&T may obtain a substantial share of that untapped market. Datran similarly points out that it is difficult to conceive how its proposed system with an initial investment of some $350 million could make any significant inroads on the revenues and economies of a nationwide telephone system which has over $40 billion in plant, a $7.7 billion investment program for 1971, and an $8.2 billion program for 1972.

35. While Western Union's revenues and facilities are also dwarfed by those of AT&T, its total net income has risen by about 45 percent since 1965, and its 1969 revenues

[9] Since MCI's comments were filed, it has applied for three additional routes.

totalled nearly $394 million. MCI asserts that Western Union's recent acquisition of TWX will further strengthen its position, adding an estimated $86 million in revenues. In that proceeding, Western Union stated that it did not fear new entry in the specialized field and that the prompt transfer of TWX would give it sufficient lead time to stand up to such "indirect" competition. *In the Matter of Western Union Telegraph Co.* (Docket No. 18519), 24 FCC 2d 664, 673. MCI further notes that Western Union expects $132 million from TWX-Telex, as compared with the $39 million and $47 million it received from Telex alone in 1968 and 1969. While Western Union's leased systems and other leased plant bring in about 32.6 percent of its yearly revenues (WU 1969 Annual Report, FCC Form R&O, pages 75-76), its largest systems are switched systems (the Automatic Digital Network for the Department of Defense and the Advanced Record System), as is Telex, with which MCI type carriers would not compete. Although Western Union has finally recognized the need for improved data communications by proposing to inaugurate a competitive system of its own, the proposed services of the applicants include many features which Western Union does not offer and has no plans to develop.

36. On "creamskimming," MCI states that its carrier network will serve 75 percent of the population and 85 percent of the business community.[10] While Datran's proposed initial network is limited to the 35 markets that it believes have the greatest initial requirement for data transmission, it has represented to the Commission that it plans ultimately to expand its system to serve all significant markets. The applicants further note that AT&T's proposed digital data system would serve only 60 markets initially, and that its telephone network, while serving most of the nation's population, serves slightly less than 50 per-

[10] See, e.g., Transcript of Oral Argument, page 14.

cent of the served area of the United States (as confirmed by the comments of USITA).

c. Cost basis for the pricing of competitive services by established carriers —

37. MCI, Datran, and the Department of Justice oppose AT&T's position that long-run incremental costs should be used as the relevant cost-criterion for pricing its competitive services. They state that incremental costs are difficult to determine, particularly where the same facilities are used to provide both competitive and non-competitive services, and may be based on unwarranted assumptions and result in cross-subsidy. MCI claims that the only practical means of assuring that AT&T's rates for specialized services will be equitable and non-discriminatory is to require that they be based on fully allocated costs. However, MCI states that the Commission need not resolve that question in this proceeding (MCI rebuttal comments, page 17).

Other Parties —

38. Apart from the applicants, a large number (over 150) of potential users and equipment suppliers, their associations, and other interested entities commented in support of new entry and many urged the Commission to act expeditiously (see Appendix B, and Appendix C, pages 37-44). Two of these parties are Government agencies.

39. The comments of the Department of Justice strongly endorse a policy of new entry in the specialized field (see Appendix C, pages 33-36, and Appendix D, pages 10-13). The Department states that it appears to be the consistent conclusion of expert studies in this field that service offerings of established carriers have not been responsive to modern needs for communications services, particularly

data transmission. This, the Department notes, may have resulted in part from the firm commitment of these carriers to traditional commercial and pricing policies and to facilities designed to provide traditional services. The various surveys also reveal that customers themselves recognize a need for new, highly specialized, variously packaged and economical communications services. The Department urges that the ultimate benefit of new entry is likely to be the offering of more varied, more responsive, more innovative and more economically priced and packaged specialized communications services for today's users. New entry would further encourage product and service innovation and create stronger incentives for cost control and economical rates. The Department states that new entry would also be consistent with the policy embodied in the antitrust laws, and with the recent recommendations of various expert governmental bodies which have urged greater reliance on competition in specialized services as well as in regulated industries generally.[11]

40. The Small Business Administration (SBA) states that information available to it shows that small business concerns are interested in flexibility and customized service, more economical service, and greater ability to use terminal equipment of their own choosing — benefits which the existing carriers do not satisfactorily provide (see Appendix C, pages 37-38). As an example, SBA points to time sharing arrangements for centrally-located convertor facilities which depend upon adequate transmission services at

[11] President's Task Force on Communications Policy, Final Report, Chapter 6, page 10 (1968); President Nixon's Special Task Force on Productivity and Competition under Professor George J. Stigler of the University of Chicago (Cong. Rec., June 12, 1969, pages 6530-6532); President's Council of Economic Advisers (Economic Report of the President, 1970, pages 108-109; Economic Report of the President, 1971, pages 128-129).

economical rates and on the flexibility and fidelity of the transmission service. According to SBA:

> "Manufacturers and lessors of convertor equipment have advised SBA that expansion of such systems, even to the outlying areas of large cities, is impeded and even prohibited by the high cost of transmission services and because of the inefficiencies inherent in transmission of information over voice grade transmission facilities. The fact that such present use of such systems is limited to very small geographic areas, for example, the Loop area in Chicago, attests to the accuracy of these contentions."

SBA asserts that the pending proposals of the applicants would provide direct and immediate benefits to small business in the area of improved transmission and reduced rates (*e.g.*, by the elimination of switching costs for the MCI type of proposal), and through increased opportunities for small business concerns to sell equipment, supplies and services.

41. Various computer and data processing interests asserted their dissatisfaction with present services and need for the proposed services. The Computer Timesharing Services Section of the Association of Data Processing Service Organizations (ADAPSO) states that present carriers have not shown the administrative ingenuity necessary to permit technological advances in time-sharing computer services (see Appendix C, page 39). ADAPSO claims that there is an important and immediate need for common carrier services such as those proposed by the applicants, who would be motivated to provide contemporary, state-of-the-art facilities. The Information Network Division of Computer Sciences Corporation gives examples in its comments of difficulties experienced with existing carriers in the area of quality and reliability of service. The American Society for

Information Sciences expressed the interest of libraries and other information centers in new entry to facilitate the sharing of data banks, and their need for low cost data transmission facilities with rapid communication-response time (see Appendix C, page 39). Many other entities involved in various software and hardware aspects of the computer and data processing industries submitted comments in a similar vein (*e.g.*, Computer Sciences Corporation; National Information Systems Corporation; Bunker-Ramo Corporation; Common; Communicon; Noxwell Corporation; DIDO Inc.; Data Communications Association; Dacom, Inc.; Industrial Data Engineers Associates, Inc.; Communications Unlimited, Inc.; Computer Communications Engineering Technology; Memorex Corporation; Paradyne Corporation; Industry Data Systems, Inc.; Tel Tech Corporation; Sanders Associates, Inc.; Computer Terminals of Minnesota, Inc,; and the Business Equipment Manufacturers Association (Data Processing Group)).

42. A number of potential users or their associations have expressed a need for and an interest in the proposed new services and facilities. The National Retail Merchants Association (NRMA) states that there is a real need, not adequately met by existing carriers, for new private line and data transmission services (see Appendix C, page 40). NR MA has conducted a survey among its members with particular emphasis on those retailers with growing private line requirements, and has attached to its filing questionnaires answered by eleven of the nation's principal retailers (which have approximately 6,000 individual retail stores in the United States and do an annual aggregate of 20 billion dollars in retail sales). Those responding favor new entry and anticipate benefits in the form of service innovation and customer responsiveness, even assuming that rates do not turn out to be lower. The American Bankers

Association has also conducted a survey among its members and, on the basis of replies from 3, 251 banks, states that the industry favors new entry and has a need for higher data transmission speeds, as well as for exceptionally high quality transmission facilities (Appendix C, page 43).[12] Greyhound Corporation states that it is vitally interested in the opportunities for new and additional bulk communications services which may be made available by new entry, and gives examples of the features in Southern Pacific's proposed system that are of particular interest to Greyhound (see Appendix C, pages 40-41). Comments in support of new entry were filed by such entities as: the Central Committee on Communications Facilities of the American Petroleum Institute; the Utilities Telecommunications Council; the National Consumer Marketing Corporation; the Federation of Independent Business; the Joint Council on Educational Telecommunications; Hallmark Cards; Pillsbury Company; Kaiser Aluminum and Chemical Corporation; National Gypsum Company; Martin Marietta Company; REA Express; Mobile Oil Company; Schlage Lock Company; and, filing jointly: Bethlehem Steel Corporation; E.I. duPont de Nemours and Company, Inc.; Olin Corporation; Union Carbide Corporation; United States Steel Corporation; American Express Company; and Weyerhauser Company. For other potential users favoring new entry, see Appendix B.

43. Several equipment manufacturers have filed comments supporting new entry, partly because of public need for the proposed services, but primarily on the ground that new entry would stimulate developments in microwave and electronics technology and expand the market for such

[12] A number of individual banks also filed comments in support of new entry (e.g., Federal Home Loan Bank of Des Moines; National Bank of Joliet; Federal Home Loan Bank of Boston; Security Pacific National Bank; Valley National Bank; and United California Bank).

equipment. Such parties include: the Electronics Industries Association; International Telephone and Telegraph Corporation; Miteq, Inc.; General Electric Company; Conic Corporation; and Alpha Industries, Inc.

44. Finally, comments in support of new entry have been received from various communications interests not directly concerned with the particular services proposed by the applicants. The three national television networks state that the adoption of policies which would encourage the entry of new entities into the common carrier field to meet special communications requirements, including, among others, those providing alternatives to users in meeting their special needs in the program transmission area, would be "highly desirable." The National Cable Television Association agrees that the availability of additional choices as to the means of satisfying communications needs would be of "inestimable value." The National Association of Radiotelephone Systems (NARS) states that unquestioned benefits have resulted from the existing competition between landline and non-landline carriers in the domestic radio common carrier field, through improved, more efficient, and less expensive communication service. NARS is of the firm belief that competition between huge diversified carriers and small, specialized or single purpose carriers will continue to benefit the public and must be encouraged by the Commission.

(3) *Discussion and Conclusions on Issue A* —

45. In short, practically all of the parties, including a wide range of interested public participants, support the analysis of our staff and urge expeditious adoption of a policy in favor of new entry on the basis of the record in this proceeding. We shall therefore address our attention to the arguments of those who are opposed, namely, the established carriers and related interests. The carriers claim, in essence, that rule making is an inappropriate

procedure for resolving the policy issues involved in new entry, both as a matter of law and of sound regulation; that the staff analysis does not comport with the applicable legal standard for new entry and rests on untested and unsupported assumptions; and that evidentiary hearing is required to determine the nature and extent of the potential market, the need for new entry, and the effect on existing carriers and their services.

a. The Commission's Authority to Proceed by Rule Making —

46. Upon consideration of the entire record, including the arguments made and authorities cited by the carriers, we remain of the view that rule making is an appropriate and proper procedure for resolving the broad policy issues confronting us here. As stressed at the outset (paragraph 2 above), this proceeding does not undertake to decide all of the issues pertinent to the pending applications, and does not go to the qualifications of the applicants or the sufficiency of particular proposals. Such questions will be resolved by appropriate procedures when the applications are processed. Rather, our purpose here is to consider what AT&T has described as "basic and important policy questions regarding the future development of the common carrier communications services throughout the United States" (paragraph 12 above). These questions necessitate an analysis of the trends and needs of the industry, are common to all of the myriad proposals and opposition pleadings, and concern a large number of other interested persons. Moreover, for the reasons discussed in paragraphs 62-102 below, we are of the opinion that the record and other material officially before the Commission affords ample basis for a decision on the policy questions and that there is no material issue of fact requiring evidentiary hearing. In our judgment, a prior resolution of the policy aspect through rule making procedures would best conduce

to a prompt, orderly and efficient disposition of these applications, and would serve the end of justice to all concerned (see Section 4 (j) of the Communications Act).

47. The Commission's legal authority to resolve the basic policy issues posed by new carrier entry in the specialized communications field through rule making rather than adjudicatory procedures seems clear. It has been generally established since *SEC v. Chenery Corp.*, 323 U.S. 194, 202, 203, that:

> The function of filling in the interstices of the Act should be performed as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. * * * [T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.

Section 214 of the Communications Act contains no explicit hearing requirement except as a prerequisite to an order directing the establishment of facilities (Section 214 (d)). The hearing requirement of Section 309 of the Communications Act does not withdraw "from the power of the Commission the rule making authority necessary for the orderly conduct of its business" (*United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202 (1956)), and "does not preclude the Commission from particularizing statutory standards through the rule making process" (*FPC v. Texaco*, 377 U.S. 33, 39 (1964)). Moreover, the general rule making power of the Commission is not limited to specific statutory authorizations, but extends to matters "not inconsistent with the act or law." *United States v. Storer Broadcasting Co., supra*, 351 U.S. at 202.

48. The adoption of policy, like that of a basic change in policy, "is better and more fairly examined and considered

in rule making proceedings, where the inquiry can be thorough and where all interested parties can participate" (*Hale v. FCC*, 425 F.2d 556, 560 (C.A.D.C., 1970)). In *WBEN, Inc. v. United States*, 396 F.2d 601, 617, 618 (C.A. 2, 1968), *cert. den.* 393 U.S. 914, the Court stated:

> The Commission was on solid ground as a matter of good sense, in concluding that "a more particularized approach * * * would [not] throw significantly more light on the appropriate course of action in a given situation, anything like enough to warrant the burden involved. * * *" Adjudicatory hearings serve an important function when the agency bases its decision on the particular situation of individual parties who know more about this than anyone else. But when, as here, a new policy is based upon the general characteristics of an industry, rational decision is not furthered by requiring the agency to lose itself in an excursion into detail that too often obscures fundamental issues rather than clarifies them.

See also, *American Airlines, Inc. v. CAB*, 359 F.2d 624 (C.A.D.C.), *cert. den.* 385 U.S. 843 (1966), to the effect that the *Storer* doctrine:

> * * * rests on a fundamental awareness that rule making is a vital part of the administrative process, particularly adapted to and needful for sound evaluation of policy in guiding the future development of industries subject to administrative regulation in the public interest, and that such rule making is not to be shackled, in the absence of clear and specific Congressional requirement, by importation of formalities developed for the adjudicatory process and basically unsuited for policy rule making.

Accord: *Regular Common Carrier Conf. v. United States*, 307 F. Supp. 941 (D.D.C., 1969).[13]

49. This Commission has generally utilized its rule making powers in considering the policy questions involved in the establishment of new communications services on a nationwide basis, including those with potential competitive impact on existing licensees, and other matters of overall industry consequence. See, for example, *Allocations of Frequencies in the Bands Above 890 Mc.* 27 FCC 359 (1959), reconsideration denied 29 FCC 825 (1960) — authorizing private microwave systems as an alternative to the use of common carrier facilities; *General Mobile Radio Service et al.*, 13 FCC 1190 (1949) — authorizing the development of competing common carrier systems in the two-way mobile radio field by allocating separate frequencies for landline and non-landline companies; *Establishment of Domestic Communication Satellite Facilities by non-Government Entities.* 22 FCC 2d 86 and 810 (1970) — consideration of the policy questions involved in applications for domestic communications satellite systems; *Television Inter-City Relay Stations.* 17 Pike & Fischer, R.R. 1621 (1958) — authorizing television stations to establish their own specialized inter-city microwave facilities; *Bamberger Broadcasting Services, Inc.*, 11 FCC 211 (1946) — establishment of the FM service; *Peoples Broadcasting Co. v. United States.* 209 F.2d 286 (C.A.D.C., 1953) and *Logansport Broadcasting Corp. v. United States.* 210 F.2d 24 (C.A.D.C., 1954) — sustaining the

[13] See also, *American Pilots' Association v. Quesada.* 276 F.2d 892, 896 (C.A.D.C., 1960); *American Commercial Lines v. CAB.* 392 U.S. 571, 592; *Grain Elevator, Flour & Feed Mill W., ILA, Local 418 v. NLRB.* 376 F.2d 774, 781 (C.A.D.C., 1967); *Cornell University v. United States.* 427 F.2d 680, 685 (C.A. 2, 1970); *Superior Oil Company v. Federal Power Commission.* 322 F.2d 601, 612, 619 (C.A. 9, 1963), *cert. den.* 377 U.S. 922, *rehear. den.* 377 U.S. 960; *United Air Lines v. CAB.* 228 F.2d 13, 16 (C.A.D.C., 1955).

Commission's use of rule making to promulgate a nationwide Table of Assignments in the television broadcasting field; *First and Second Report and Order on CATV*, 38 FCC 683 (1965) and 2 FCC 2d 725 (1966) — rules governing the carriage and non-duplication of broadcast stations by CATV systems; *First Report and Order in Docket No. 18397*, 20 FCC 2d 201 (1969) — CATV program origination.[14]

50. It is important to bear in mind that we are "concerned here only with the type of hearing required, not with the right to a hearing" (*Transcontinent Television Corp. v. FCC*, 308 F.2d 339, 343 (C.A.D.C., 1962)). The parties have been fully heard on the issues specified in the *Notice* in accordance with the rule making procedures prescribed in the Administrative Procedure Act (5 U.S.C. 553). In addition, they have been accorded oral argument before the Commission *en banc* and an opportunity to submit written rebuttal. A party is not "entitled to insist upon a different sort of hearing than it was accorded" unless there is a specific and significant factual issue in dispute that needs to be resolved by confrontation and cross-examination of witnesses. *Transcontinent Television Corp. v. FCC, supra; Goodwill Stations, v. FCC*, 325 F.2d 637, 641-642 (C.A.D.C., 1963). The mere circumstance that an issue may be subject to controversy does not necessitate a resolution of the matter through adjudicatory procedures. We are not

[14] In the Second CATV Report the Commission attempted the evidentiary hearing approach to the carriage of distant signals in major markets. But after completing one major market hearing, the Commission "recognized the inadequacy of such individual hearings and the need 'for the formulation of over-all policy' to govern CATV operations" in major markets and accordingly instituted rule making "designed to achieve the 'far-ranging, overall view [that] is necessary if the Commission is to come to grips with this dynamic field' " (*Bucks County Cable TV, Inc. v. United States*, 427 F.2d 438, 445-446 (C.A. 3, 1970)). See *Midwest Television, Inc.*, 13 FCC 2d 478, 488-489; *Notice of Proposed Rule Making in Docket No. 18397*, 15 FCC 2d 417, 433-434.

persuaded that there is any such issue here (see paragraphs 62-99, below). Evidentiary hearing is not required where the "applications, exhibits, affidavits, intervention petition and other pleadings, developed the salient facts of dispute to a sufficient depth and detail that the Commission was enabled to perceive, define and resolve the various strands of public interest" (*Citizens for Allegany County, Inc. v. FPC*, 414 F.2d 1125, 1129 (C.A.D.C., 1969).[15] Further, the "subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked — the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceeding, and similar questions — were explicitly and by implication left to the Commission's own devising" (*FCC v. WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 283 (1949)).

51. That the carriers claim adverse impact may flow from a policy in favor of new entry, does not invalidate the use of the rule making procedure to weigh that factor. The use of rule making may be "valid even if its effect is to drive some operators out of business (*American Trucking Association v. United States*, 344 U.S. 298, 322), or the results are "of immediate and grave economic import to petitioner" (*Williapoint Oysters, Inc. v. Ewing*, 174 F.2d 676, 694 (C.A. 9, 1949), *cert. den.* 339 U.S. 860, *rehear. den.* 339 U.S. 945), or some "will be easily able to survive under these rules; some will not" (*Capitol Airways, Inc. v.*

[15] See also, *NBC v. Federal Communications Commission*, 362 F.2d 946 (C.A.D.C., 1966); *Alaska Steamship Co. v. FMC*, 356 U.S. 59 (1966); *FPC v. Texaco Co., Inc.*, 377 U.S. 33 (1964); *Pikes Peak Broadcasting Co. v. FCC*, 422 F.2d 671 (C.A.D.C., 1969); *Railway Express Agency v. CAB*, 345 F.2d 445 (C.A.D.C., 1965)' *California Citizens Band Association v. FCC*, 362 F.2d 946 (C.A.D.C., 1966).

Civil Aeronautics Board, 292 F.2d 755, 758 (C.A.D.C., 1961)).[16]

52. We are not persuaded by Western Union's contention that the broad policy issues involved in new entry should be examined in individual proceedings on a route by route basis. As AT&T points out, we are concerned here with the future development of communications services throughout the United States. Both AT&T and Western Union operate on a nationwide basis. Datran has proposed a nationwide, switched network, the MCI carriers also propose nationwide operations through interconnection, and various other applicants (such as Southern Pacific, Western Tele-Communications, Inc., and United Video) have proposed routes crossing very large geographic areas of the United States. Moreover, many of the potential customers expressing a need for and interest in the proposed service have business operations or other activities which are nationwide in scope. While there obviously may be some differences among routes, no circumstances have been called to our attention that might lead us to believe that new entry to serve expanding and new markets for specialized communications service would be contrary to the public interest in any particular area. Our review of the applications and opposition pleadings filed prior to the *Notice* clearly indicates that in each case both sides rely essentially on the same arguments. We see no interest of the public to be served by holding a multiplicity of proceedings to consider the same con-

[16] See also, "The Choice of Rule Making or Adjudication in the Development of Administrative Policy," 78 Harv. L. Rev. 921 (March, 1965); Robinson, "The Making of Administrative Policy: Another Look At Rulemaking and Adjudication and Administrative Procedural Reform," 118 U. of Pa. Law Review 485 (1970) Davis, Administrative Law Treatise, Vol. 1, Sec. 6.13, 1965, Pocket Supp., pages 150-151; "The Use of Agency Rulemaking to Deny Adjudication Apparently Required by Statute," 54 Iowa Law Review 1086 (1969).

tentions over and over again, or by a piecemeal, regional evaluation of policy factors which are essentially nationwide in scope. If the record before us enables us to conclude — as we believe it does — that new entry on a nationwide basis is in the public interest, it follows that route-by-route analysis as sought by Western Union is neither necessary nor desirable. Moreover, the delay entailed in such a cumbersome procedure would be contrary to the public interest in an early resolution of the need for the systems proposed to be established.

53. Contrary to the further contention of Western Union, we have not abdicated our regulatory functions or engaged in a wholesale de-regulation of a class of carriers by invoking our rule making powers to consider the policy issues posed by new entry in the specialized field. Where, as here, the rule making procedure permits a sound evaluation and determination of policy to guide the future development of the industry and is also conducive to a prompt, orderly and efficient disposition of the matters at issue, we are effectuating our statutory responsibilities, rather than abrogating them, by choosing the procedure deemed most suitable to a resolution of the kind of issue before us.[17] *SEC v. Chenery Corp., supra; Hale v. FCC, supra.* Our disposition of the policy aspect is consistent with applicable legal standards (see sections (b) and (c) below), and does not constitute a determination that all or any of the pending applications will be granted. Each application must still meet applicable statutory standards and comport with the policies established herein. Thus, each applicant will be "required to make a satisfactory showing that it is qualified and that the service it seeks to offer is

[17] As in the case of any policy or rule of general applicability, a waiver, exception or evidentiary hearing may be granted upon an adequate showing of exceptional circumstances making it inappropriate to apply the policy or rule in a particular situation. *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205 (1955).

technically and economically sound and would otherwise serve the public interest" (paragraph 2 above).

54. In sum, assuming the validity of our conclusion below (section (c)) as to the absence of any significant factual issue requiring resolution through confrontation and cross-examination of witnesses, we must reject the contention that we have exceeded our legal authority or abused our discretion by utilizing the rule making procedure to determine Issue A.

b. Applicable legal standard for authorizing new entry—

55. The carriers further contend that the staff analysis does not comport with the applicable legal standard for authorizing new carrier entry. They assert that under Section 309 of the Act, where an applicant is a carrier the Commission must apply the standards of Section 214. It is further claimed that this section was enacted to avoid wasteful competition and uneconomic duplication of facilities, and requires a finding that there is a need for the proposed services which existing carriers are not now adequately meeting and could not in the future adequately meet. We are of the opinion that this is too narrow a construction of Sections 309 and 214 and the Commission's responsibilities thereunder.

56. The statutory standard governing the Commission's consideration of applications for microwave radio facilities to provide common carrier services is broadly stated in Sections 309 and 214 of the Communications Act: whether a grant would serve the present or future public interest, convenience and necessity — a "criterion not too indefinite for fair enforcement." *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 90 (1953). In determining the threshold question here as to whether a licensing policy in favor of new entry would meet that test, the basic touchstone for decision is

the Commission's mandate to regulate "interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communications service with adequate facilities at reasonable charges * * *" (Section 1 of the Act). Section 303 (g) of the Act further directs that the Commission shall "generally encourage the larger and more effective use of radio in the public interest."

57. In order to accomplish this "comprehensive mandate," the Commission was given "not niggardly but expansive powers" and wide discretion to adopt flexible procedures, rules and orders to meet ever-changing communications needs. Sections 4 (i) and (j) and 303 (r) of the Communications Act; *National Broadcasting Co. v. United States*, 319 U.S. 190; *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137-138; *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172-173; *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202-203. This flexibility to take administrative action imperative for the achievement of an agency's ultimate purpose applies not only to broadcasting but also to the field of common carrier regulation. *Permian Basin Area Rate Cases*, 390 U.S. 747, 776-777; *American Trucking Association v. Atchison, Topeka and S.F. Ry. Co.*, 387 U.S. 397, 416.[18] As the Supreme Court stated in *American Trucking (id.)*:

> [We] agree that the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. * * * In fact, although we make no judgment as to the policy aspects of the

[18] See also, Fuchs, "The New Administrative State; Judicial Sanction for Agency Self-Determination in the Regulation of Industry," 69 Columbia Law Review 216 (1969).

> Commission's action, this kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed within the limits of the law and of fair and prudent administration, to adopt their rules and practices to the Nation's needs in a volatile and changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.

58. It is settled, moreover, in the communications common carrier field that "competition is a relevant factor in weighing the public interest" and that the exercise of the Commission's statutory responsibility "leaves wide discretion and calls for imaginative interpretation." *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 90, 93-97 (1953). To be sure, the Commission may not grant applications to provide a competitive service merely because it assumes that "competition is bound to be of advantage, in an industry so regulated and so largely closed as this one" (*id.*, at 97). However, it may authorize competitive entry after an analysis of the trends and needs of the industry and in the exercise of "the discretion given it by the Congress" (*id.*, at 95, 97). "In reaching a conclusion that duplicating authorizations are in the public interest wherever competition is reasonably feasible, the Commission is not required to make specific findings of tangible benefit" (*id.*, at 96). "In the nature of things, the possible benefits of competition do not lend themselves to detailed forecast" (*Id.*, at 96). The "Commission must at least warrant, as it were, that competition will serve some beneficial purpose such as maintaining good service or improving it" (*id.*, at 97). While an applicant is not required to demonstrate tangible benefits, there must be "ground for reasonable ex-

pectation that competition may have some beneficial effect" (*id.*, at 97).[19]

59. Upon review of the staff analysis, we think that it follows the standard of the *RCA* case and treats the considerations pertinent to the exercise of our discretion. We do not agree with the carriers' position that a policy in favor of new entry can legally and appropriately be adopted only if we conclude that the established carriers could not, in the future, adequately provide the proposed services. (See also, paragraphs 72 through 76 below). There is no uniform requirement that new entry may be authorized only if existing carriers are unable or unwilling to provide the proposed services.[20] Adequacy of existing common carrier

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[19] On remand in that case the Commission concluded on the basis of its experience that competition resulting from a grant of the applications was reasonably feasible and would serve the public interest. It stated: "What we require is, that, in order to be successful an applicant must demonstrate that, as has been done here, through the operation of such a circuit, some public need would be served or some advantage would accrue to the public, or at least that there is a reasonable expectation that such competition may have some beneficial effect." *Mackey Radio and Telegraph Company, Inc.*, 19 FCC 1321, 1350 (1955), aff'd. *RCA Communications, Inc. v. FCC*, 238 F.2d 24, 27-28 (1956), *cert. den.* 352 U.S. 1004 (1957).

[20] It has often been stated in cases involving the enjoinment of uncertificated construction (e.g., *Texas & Pacific Ry.* v. *Gulf C. & S.F. Ry.*, 270 U.S. 266, 277 (1926); *Texas N.O.R.R. v. The Northside Belt Ry.*, 276 U.S. 475, 479 (1928); *Long Island R.R. v. New York Central R.R.*, 281 F.2d 379, 384 (C.A. 2, 1930)) that the purpose of requiring a certificate for new construction under the Interstate Commerce Act was to prevent waste of carrier resources of two sorts — waste of the resources of the constructing carrier by unwise expenditures and waste of the resources of other carriers by extension of a new carrier into an area adequately served by existing lines. However, this does not mean that the ICC in deciding whether to issue a certificate under the public interest, convenience and necessity criterion of that Act may not take into account "the transportation needs of the public," the "necessity of

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service is "only one element to be considered in arriving at the broader determination of public convenience and necessity . . . . Other elements of importance appear to be the desirability of competition, the desirability of different kinds of service and the desirability of improved services." *Nashua Motor Express, Inc. v. United States*, 230 F. Supp. 646, 652 (D. N.H., 1964), and cases there cited.[21] Where, as here, growing future traffic is involved, the "adequacy of existing carriers to render the new service is not determinative" (*ICC v. J-T Transport Co.*, 368 U.S. 81, 88

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[20] (continued)
enlarging transportation facilities," and "measures which 'would best promote the service in the interest of the public and the commerce of the people'." *New York Central Securities Corp. v. United States*, 287 U.S. 12, 24-25. Moreover, whatever the analogy between the railroad cases and competitive entry in the monopoly telephone and telegraph fields, "questions of competitive injury in the transportation field are very different from questions of public injury in the field of communications" in other areas and this Commission need not adopt the rationale of ICC decisions where they are of little relevance to the situation before it. *Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359, 362-363 (C.A. D.C.), *cert. den.* 375 U.S. 951 (1963). What is involved here is a quite different situation: the sharing of relatively new markets which are expanding at a rapid rate and have a very large future growth potential. Further, while wasteful duplication is generally to be avoided, duplication is not wasteful where a certificating agency appropriately concludes that competition is reasonably feasible and may be expected to have some beneficial effect (*FCC v. RCA Communications, Inc., supra*).

[21] As the Department of Justice points out, the older ICC decisions in motor carrier cases, such as *Hudson Transit Lines, Inc. v. United States*, 82 F. Supp. 153 (S.D. N.Y., 1948), aff'd. 338 U.S. 802 (1949), no longer represent the modern approach in the motor carrier field. See also, Fulda: Competition in the Regulated Industries (Transportation) 88 (1961): "The central fact of intercity motor carriage of passengers is the existence of the Greyhound Corporation . . . Hence certification attempts by independent bus lines usually represent attempts to compete with the giant who overshadows the industry. It is not surprising that, on the whole, the Commission reacted favorably to these efforts."

(1961)).[22] A certificating agency "should consider the public interest in maintaining the health and stability of existing carriers, see *United States v. Drum*, 368 U.S. 370, 374 (1962); but it is also true that, upon the basis of appropriate findings, 'the Commission may authorize the certificate even though the existing carriers might arrange to furnish successfully the projected service.' " *United States v. Dixie Highway Express, Inc.*, 389 U.S. 409, 411-412 (1967). See also, *ICC v. Parker*, 326 U.S. 60, 70 (1945).

60. "[N]o carrier is entitled to protection from competition in the continuance of a service that fails to meet a public need, nor, by the same token, should the public be deprived of a new and improved service because it may divert some traffic from other carriers." *Schaffer Transportation Co. v. United States*, 355 U.S. 83, 91 (1957). A certificating agency "may properly look to the existence of some competition, even if entry is limited by legal barriers or regulatory necessity, as an important and effective tool in increasing efficiency and quality of service." *Atlantic Seaboard Corp. v. FPC*, 404 F.2d 1268, 1272 (C.A.D.C., 1968). When an industry is "a highly regulated industry critical to the Nation's welfare," this "makes the play of competition not less important but more so." *United States v. Philadelphia National Bank*, 347 U.S. 321, 372 (1963). In *Strickland Transportation Co., Inc., Extension — Louisiana Routes*, 77 M.C.C. 655 (1958), additional competition was certificated because the existing carriers "can-

[22] In the *J-Transport Co.* case, the Supreme Court stated that:

> "By indulging in a presumption 'that the services of existing carriers will be adversely affected by a loss of potential traffic, even if they have not handled it before,' and by assigning to the applicants the burden of proving the inadequacy of existing services, the Commission favored the protestants' interests at the expense of the shippers' in a manner not countenanced by anything discoverable in Congress' delegation to it of responsibility." (368 U.S., at 90).

not be depended upon to provide the type of service of which they are capable, except when faced with imminent threat of additional competition." And when there is doubt as to whether the facilities of existing carriers will be expanded fast enough to meet growing and significant future needs, a certificating "Commission has discretion to decide" that "the public interest requires that future * * * needs be assured rather than left uncertain," *i.e.*, that the best regulatory action is to certificate additional carriers prepared to meet those needs. *United States v. Detroit and Cleveland Navigation Co.*, 326 U.S. 236, 241 (1945).

61. It is in this broader and more flexible context that we believe we should apply the statutory standards of Sections 309 and 214 to resolution of the issue of entry which is before us.

c. The sufficiency of the record to enable a decision on the merits—

62. We turn now to the carriers' argument that the staff analysis rests on untested and unsupported assumptions, and that evidentiary hearing is necessary to determine the nature and extent of the potential market, the need for new entry, and the effect on existing carriers and their services.

63. Upon review of the entire record and other material officially before the Commission, we find ample support for the staff's conclusions as to the trend of the communications industry generally, the nature of the potential market, and the public need and demand for the proposed services. (*Notice*, paragraphs 29-30). There is no room for dispute that the demand for communications services is growing very rapidly and can be expected to continue to expand at very high rates. This is shown by the statistics contained in the carriers' annual reports to the Commission

and other filings over the last several years.[23] Projecting present growth rates, AT&T has estimated that the existing plant of the Bell System would quadruple by 1980 (see statement of AT&T Vice President R.R. Hough before the FCC during continuance surveillance meetings, week of September 8, 1969). It is clear, moreover, that this projection is based primarily upon the rapidly expanding growth in local and interstate use of the standard voice communications services of the Bell System—services which the applicants do not seek to provide. Interstate revenues constitute only about 30 percent of AT&T's total revenues, and about 87 percent of the interstate revenue is derived from message toll telephone and wide area telephone services which have an annual growth rate of about 12 percent. Indeed, AT&T notes in its comments that the "greatest service demand has been and still is for voice communication" (AT&T comments, page 50).

64. It may be helpful at this point to clarify one matter. Contrary to the contention of some of the parties, the staff analysis did not err by placing too much emphasis on AT&T and too little on Western Union and the independent telephone companies. In analyzing the trends of the industry, the needs of the public, and the effect of new entry in the interstate specialized field on services of established carriers, it is necessary and appropriate to focus primarily on AT&T. There is no question but that AT&T is now the dominant entity on the domestic communications scene. In 1970, the Bell System had gross operating revenues of approximately $16.9 *billion*, as compared to approximately $402.4 *million* for Western Union, and their

[23]The carriers do not, of course, repudiate the figures contained in their own reports to the Commission. MCI in its comments has accurately referred to some of these statistics. We occasionally select others as more relevant for our purposes. While the choice as to the relevant statistics may be subject to argument, the statistics themselves are unchallenged and do not require evidentiary hearing.

gross investments in communications plant were approximately $54.8 billion for the Bell System and $939.6 million for Western Union (1970 AT&T Annual Report (Form M), Schedule 12A; 1970 Western Union Annual Report (Form O Advance Copy), Schedule 100). AT&T's investment program is on the order of $7.7 billion for 1971 and $8.2 billion for 1972. While Western Union's revenues and facilities are growing,[24] its operations are on a modest scale alongside those of AT&T. For purposes of this proceeding, we accept the estimate of USITA (Appendix C, page 31) that the independent telephone companies have invested over $11 billion in some 11,000 local exchanges. However, they participate in interstate service primarily by providing local distribution facilities which interconnect with the facilities of the Bell System. They do not, with minor exceptions, furnish intercity facilities. Thus, while the potential impact on Western Union and the independents is a relevant factor to be weighed in our determination (see paragraphs 84 through 87 below), we must pay particular attention to the entity upon which the public is now primarily dependent for the provision of interstate services.

65. There is abundant support for the staff's conclusions that the specialized communications market, particularly for data communications, is growing at a rapid rate, and that there is a very large potential market yet to be developed. The market studies of the applicants all point in that direction (e.g., the studies submitted with the MCI applications by Spindletop Research Center and, Arthur D.

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[24] Western Union's revenue growth is shown by its annual reports. Moreover, in applying for microwave facilities on its Cincinnati-Atlanta route (File Nos. 5623/5633-C1-P-70, granted by Commission action released on April 16, 1971, FCC 71-391), Western Union stated that its growth rate nationwide has been 14.8 percent (despite the falling volume of message traffic).

Little & Co.;[25] Datran's market studies some of which were conducted by Booz, Allen and Hamilton, Inc. (see Appendix C, pages 9-10); Southern Pacific's field survey and the market study made on its behalf by Computer Sciences Corporation (see Appendix C, page 14); and a market study made by Arthur D. Little, Inc. for Nebraska Consolidated Communications Corporation (NCCC), a survey conducted by the NCC staff, and letters of interest from various firms (see Appendix D, pages 6-7)).

66. The market studies of the applicants are generally consistent with the forecasts made in independent reports to the Commission by Stanford Research Institute (SRI) and Dittberner Associates (Dittberner), other published forecasts,[26] the record in the Computer Inquiry (Docket No. 16979), and our own findings in that proceeding. In its

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[25] In addition to the Spindletop and A.D. Little studies, the MCI applications contain:

(1) A regional study summarizing the types of firms in that region and growth rates of the firms by various economic indicators;

(2) Letters of intent and interest from firms contacted by the MCI carriers;

(3) A mail questionnaire and tabulation of results; and a

(4) Study prepared by Technical Communications Corporation, entitled: "The Adverse Effect of Data Transmission on the Voice Network."

[26] See, e.g., "Terminal Makers Brisk Outlet for Modem, Coupler Procedures," *Electronic News*, June 1, 1970, p. 4; Auerback, "Terminal Shakeout on the Way," *Datamation* May, 1970, p. 81; R.L. Arouson, "What's Happening to Data Communication," *Control Engineer*, November 1969, pp. 107-111; "Whole New Market," *Forbes*, July 1, 1969, p. 43; Manley R. Irwin, "Computers and Communications: The Economics of Interdependence," Law and Contemporary Problems, Duke University Spring 1969, Vol. XXXIV, p. 361; President's Task Force on Communications Policy, *Staff Paper 1*, Part I (Clearinghouse for Federal Scientic and Technical Information, Springfield, Virginia, June 1969), Appendix A, pp. 22, 24.

report to the Commission in the Computer Inquiry,[27] SRI forecast that data usage (measured in terminal hours) would increase from less than one percent of total usage of the Bell System plant to between 10-50 percent of total usage by 1980 (1 SRI Report 7379B, page 51). AT&T's estimate in the Computer Inquiry was that data usage would amount to 5-10 percent of peak network load by 1980. For the Dittberner forecasts as to anticipated dynamic growth in data communications, see pages 20, 22 of its report on extended interconnection privileges of customer-owned equipment, submitted to the Commission on September 1, 1970.

67. As we found in our Final Report and Order in the Computer Inquiry (FCC 71-255, paragraph 7), there is "virtually unanimous agreement by all who have commented in response to our inquiry, as well as by all those who have contributed to the rapidly expanding professional literature in the field, that the data processing industry has become a major force in the American economy, and that its relative importance to the economy will increase in both absolute and relative terms in the years ahead."[28] We further found that "data processing cannot survive, much less develop further, except through reliance upon and use of communications facilities and services (*ibid.*).

68. Finally, the carriers themselves do not dispute the present and potential future growth of the specialized communications market, particularly for data communication. In its comments in this proceeding, AT&T projected that private line revenues would grow to $1.5 billion by 1975 and

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[27] See, Stanford Research Institute Reports 7379B, Policy Issues Presented by the Interdependence of Computer and Communications Services, *et al.* (2 Vols.), prepared for the FCC, Contract RC-10056, February, 1969.

[28] The responses in the Computer Inquiry are summarized in Vol. 2 of the SRI Report, *supra*.

$2.7 billion by 1980.[29] AT&T further notes that the growth rate of data sets was over 50 percent in 1969 (Transcript of Oral Argument, p. 162), and concedes that there is "no real dispute" that the "market for data communications is large and is growing" (Appendix C, p. 23). Western Union also "believes that there is an expanding market for communications services, including data communications as well as other forms" (Western Union comments, page 2).

69. While there may be some overlap between the services proposed by the applicants and the present offerings of the established carriers, we find sufficient warrant for the staff's conclusion that the applicants are seeking primarily to develop new services and markets, as well as to tap latent, but undeveloped submarkets for existing services, so that the effect of new entry may well be to expand the size of the total communications markets. To be sure, the established carriers now provide data transmission and private line services. However, the services proposed by the applicants have technical and service features significantly different from those of the established carriers. As the staff notes (*Notice*, paragraph 29), the existing communications network of the Bell System was established to meet the requirements of the voice transmission market where consumer demands are generally similar and economies of scale may be achieved. The facilities were engineered for voice and record analog transmission (though digital transmission facilities are being gradually incorporated), and with design objectives optimized for voice (e.g., the avoidance of steady line noise more than impulse noise and

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[29] As MCI points out, in 1969 AT&T's reported revenues from five categories of toll private line services (telephone, teletypewriter, other telegraph, Telpak and other services) amounted to approximately $561 million (or $638 million if revenues from program transmission are included). Bell System Annual Reports for 1969 (FCC Form M), Sched. 34, p. 50. The average annual growth rate in private line revenues between 1965 and 1969 was 14.9 percent (MCI comments, p. 114).

phase distortion, see *Notice*, footnote 19). This is entirely understandable since the "greatest demand has been and still is for voice communication" and the general public must depend primarily upon the switched voice network of the Bell System for the provision of this basic service. The maintenance and improvement of such service is therefore a matter of first priority for the Bell System.

70. However, data and other specialized users may require not only a different application of communications technology, but also have service requirements that are heterogeneous in character (see 2 SRI Report No. 7379B, page 49, and 1 SRI Report No. 7379B, pages 46-47). The proposals of the applicants are oriented toward meeting these special and diverse technical and service requirements, and toward achieving the economies and other benefits that may flow from specialization. Datran proposes to construct an all digital technology data transmission system which would avoid the necessity of converting digital signals to analog and back again (see paragraphs 4 and 5 above). It is offering service features designed to meet the special requirements of data transmission users, e.g., lower costs, end-to-end compatibility, rapid connection, high reliability, simultaneous two-way transmission, a wide selection of switched speed offering, a low incidence of network busy conditions, interconnection flexibility for user-provided facilities, asymmetry, etc. (see paragraphs 5 and 33 above). Other applicants, while proposing to use analog or analog/digital transmission techniques, propose to offer both voice and non-voice services with facilities more closely designed to the requirements of transmitting data and other non-voice traffic. MCI's proposed "customized" or "individually tailored" private line services purport to offer customers the flexibility and benefits of private microwave at lower cost to the user, e.g., the exact bandwidth required for any particular service, any bandwidth that is required, and flexibility in the use of channels and

customer terminal equipment (see paragraphs 7-9 and 33 above; Transcript of Oral Argument, pages 7-12). To the extent that customers may be attracted by any or all of these or other features of the applicants' proposals — customers who would not otherwise use or make such extensive use of the specialized service offerings of established carriers, it is a reasonable conclusion that the effect of new entry would be expansion of the total communications market. Moreover, competition within the market for specialized services, should motivate innovations or modifications in the service offerings and/or facilities by all carriers serving that market and thus produce even greater growth rates in total specialized traffic than the growth rates projected in the context of the existing industry structure.

71. Further, there is no doubt as to the validity of the staffs' conclusion that there is an increasing and widespread public demand for the availability of diverse and flexible means for meeting specialized communications requirements, and a substantial public need for the proposed service offerings — a need which has not been adequately met by the established carriers. These conclusions are overwhelmingly supported by the market studies, surveys, and the letters of customer intent and interest submitted by the applicants; by the responses in the Computer Inquiry;[30] and by the surveys conducted by and

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[30] In its report to the Commission in the Computer Inquiry (Vol. 1, pp. 46-47), SRI listed ten areas in which the data processing industry considers "present performance characteristics of the telephone network are in need of improvement for data uses" (see also SRI Report No. 7379B-2, pp. 52-62, and SRI Report No. 7379B-3, pp. 15-18, 38-41):

"1. A need for rapid connect and disconnect (a few tenths of a second)

2. A need for a greater variety of transmission speeds and bandwidths

(continued)

comments of the public parties to this proceeding (see paragraphs 38-44 above, and Appendix B). We are particularly impressed by the unanimity of viewpoint among such a wide cross-section of varied interests, and accord substantial weight to the views and desires expressed by the public participants.

72. As Datran points out, AT&T now recognizes the need for a separate digital data system as evidenced by its own plans to institute such a system to serve 60 cities by 1975. Indeed, the basic thrust of the carriers' position is not so much a claim that the proposed services are not needed, but rather an argument that there is no need for new entry because the established carriers are capable of meeting the present demands and future requirements of the public. AT&T relies on various statements in the SRI Report to the effect that: "most present data transmission requirements . . . can be met by the wide variety of services available under the common carriers' public or special tariffs" (2 SRI Report No. 7379B, page 49), and "the major carriers are capable of meeting much of the projected demand for data communications in the next decade through low marginal

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[30] (continued)

3. A need for switched duplex connections, e.g., independent, separate paths for the two directions of transmission, in voice grade circuits
4. A need for a choice of different data speeds in the two directions of transmission
5. A need to reduce error rates
6. A need for data on error performance and circuit characteristics with respect to amplitude and delay
7. A need for standards with respect to circuit reliability and transmission quality
8. A need for reduction in the variability of transmission performance in the public switched network
9. A need for improvement in circuit test procedure and techniques
10. A need for an all digital data transmission network."

cost modifications of their existing plant" (1 SRI Report No. 7379B, page 46).

73. We note, first, that these quotations are partial and taken out of context of SRI's qualifying statements. For example, the full text of the paragraph containing the first quotation is as follows (2 SRI Report No. 7379B, page 49):

> "The overriding factor concerning adequacy of communications common carrier services for computer users' data transmission needs, as evident in the responses, is that the carriers' existing facilities and practices have been developed over more than a half century primarily to meet the large and steadily growing need for widespread availability of voice transmission. As a result of this evolutionary development, approximately 100 million telephones are in use throughout the nation. Computer users' needs for data transmission have begun to emerge recently and rapidly and have had to be met largely by adaptations of the existing voice transmission system. Compared with voice communications, data transmission needs are currently much smaller, are growing more rapidly, and have different operating characteristics. Most present data transmission requirements, as the responses indicate, can be met by the wide variety of services available under the common carriers' public or special tariffs. But major questions are raised in the responses about whether and when the national switching network facilities and tariffs will need to be modified significantly or succeeded by a separate national switching network that is designed specifically for efficient data transmission."
> [Footnotes omitted.]

Further, while stating that much of the projected demand could be met through low marginal cost modifications of existing plant, SRI also points out that (Vol. 1, page 48): "If a capital investment is required in order to obtain future benefits for data users, the carriers must convince themselves that such an investment is likely to pay for itself in increased network usage by data users." Following such statements, SRI concludes (Vol. 1, page 53):

> "Generally speaking, we believe that there is good evidence that the major carriers are interested in responding to data customers and their needs. Are they as responsive as companies operating in a competitive environment? Should we expect them to be? These and related questions go beyond our ability to provide answers."

74. More important, we do not think that the adequacy or capability of the established carriers to meet future requirements should be the determinative factor here, where growing future traffic is involved and new services are proposed. See cases cited in paras. 59-60 above. Even assuming that "the existing carriers might arrange to furnish successfully the projected service" (*United States v. Dixie Highway Express, Inc.*, 389 U.S. 409, 411-412 (1967)), there are other benefits reasonably to be anticipated from new entry in the specialized communications field.

75. These benefits, in the words of the staff, are:

(1) "By permitting the entry of specialized carriers, we would provide users with flexibility and a wider range of choices as to how they may best satisfy their expanding and changing requirements for specialized communication service" (*Notice*, paragraph 30).

(2) "There is also a question as to whether the existing carriers can meet the requirements in the specialized markets promptly, efficiently and effectively without prejudice to full and timely satisfaction of the increasing requirements of the public monopoly services. The responsibility for meeting the nation's growing and changing communications requirements is now largely concentrated in the Bell System. This responsibility is becoming more and more difficult to discharge in a manner which enables the Bell System to satisfy timely and effectively all existing and anticipated communications requirements. This is partly because of the diversity of such requirements, the obvious problems of designing and engineering facilities capable of meeting all such requirements with equal efficiency, economy and expedition, and the huge and increasing amounts of new capital the Bell System must raise for construction purposes. The entry of new carriers would have the effect of dispersing somewhat the burdens, risks and initiatives involved in supplying the rapidly growing markets for new and specialized services among a multiplicity of entrepreneurs who appear ready, willing and able to assume these undertakings. It would also expand the capability of the communications industry to respond to the challenge of meeting the rapidly growing and varied demands of communications users" (*Notice*, paragraph 32).

(3) "Further, while economies of scale may result when large general purpose transmission facilities can be used to meet relatively

homogeneous communications requirements, there may be other drawbacks. The sheer size of the AT&T organizational structure, its enormous financing requirements, its vertical integration, and near monopoly position in the provision of communications services may make it slower to perceive and respond to individual, specialized requirements and to initiate market and technical innovations. [Foonote omitted.] Competition in the specialized communications field would enlarge the equipment market for manufacturers other than Western Electric, and may stimulate technical innovation and the introduction of new techniques. Moreover, new carriers with smaller scale operations could devote their undivided attention to the particular needs to be served and, lacking a captive market, would be under pressure to innovate to produce those types of services which would attract and retain customers" (*Notice*, paragraph 34).

(4) "In an industry of the size and growing complexity of the communications common carrier industry, the entry of new carriers could provide a useful regulatory tool which would assist in achieving the statutory objective of adequate and efficient services at reasonable charges. Competition could afford some standard for comparing the performance of one carrier with another. Moreover, competitive pressure may encourage beneficial changes in AT&T's services and charges in the specialized field, and stimulate counter innovation or the more rapid introduction of new technology" (*Notice*, paragraph 35).

76. It appears to us that the grounds stated by the staff for anticipating benefits from new entry are reasonable and in accord with the views of most parties to this proceeding. They are not controverted by the carriers, except as they generally urge that the staff's conclusions are unsupported and require evidentiary hearing. However, we are "not required to make specific findings of tangible benefit," for in "the nature of things, the possible benefits of competition do not lend themselves to detailed forecast" (*FCC v. RCA Communications, Inc.*, 346 U.S. 86, 96). That being the case, we see no necessity for, or useful purpose to be served by, evidentiary hearing on a question of this nature. It is our judgment, based on our cumulative knowledge of the industry and the entire record in this proceeding — including our staff's analysis, that there is sufficient ground for a reasonable expectation that new entry here will have some beneficial effects.[31] We so warrant.

77. We consider next the contention that the staff analysis does not adequately treat the effect of new entry on the existing carriers and their services to the public.

78. AT&T claims that the diversion of revenues from new entry would not be insubstantial and might prejudice telephone users by delaying the installation of large capacity facilities (e.g., L5 coaxial cable carrier systems) on high density routes — thereby jeopardizing the realization of declining unit costs which would benefit all classes of AT&T's customers. AT&T claims that competing carriers would simply be engaged in "cream-skimming" and thus

[31] We note that our independent judgment from a communications standpoint is consistent with the recommendations of various expert government bodies. See the comments of the Department of Justice (Appendix C, page 33, footnote 31).

cause AT&T to depart from nationwide cost-averaging and the maintenance of nationwide uniform interstate rates. Like the staff, we do not see how there could be any diversion of revenues of a magnitude to have the impact claimed by AT&T, in view of the very small percentage of AT&T's existing total market that is vulnerable to competition of the kind proposed here, the growth rate of Bell's basic services, and the likelihook that AT&T would obtain a very substantial share of the potential market for specialized services.

79. AT&T's reports to us indicate that the Bell System had gross operating revenues of approximately $16.9 billion in 1970, as compared to about $15.7 billion in 1969 (not including income from other sources such as Western Electric). Most of these revenues were derived from intrastate and interstate services which the applicants do not seek to provide.[32] Interstate revenues constitute about 30 percent of AT&T's total revenues, and about 87 percent of the interstate revenue is derived from message toll telephone (MTT) and wide area telephone services (WATS). Interstate private line revenues (including revenue from program transmission — a service not proposed by the applicants) amount to about 4% of total Bell System revenues. While there is some data usage of the switched network, it has been estimated that such usage (measured in terminal hours) accounted for less than 1% of total usage (intrastate and interstate) in 1968 (1 SRI Report 7379B, p. 51), and about 1.7% in 1969 (paragraph 34 above).

80. Projecting present growth rates, AT&T has estimated that the existing plant of the Bell System would quadruple by 1980. As indicated in paragraph 63 above, this projection is based primarily upon the rapidly expanding growth in the use of standard voice com-

[32] AT&T's intrastate revenues include not only local service, but also intrastate toll service. All of the applicants are proposing interstate services, except for some in Texas.

munications services. Revenues from interstate MTT and WATS had an annual growth rate of about 12 percent from 1965 to 1969. During the same period the growth rate for interstate private line services was about 15 percent, and AT&T estimates that revenue from such services would amount to $2.7 billion by 1980. This figure would still constitute a relatively small percentage of total interstate revenues when compared to the compounded effect of a 12 percent annual growth in interstate MTT and WATS revenues. In this proceeding AT&T stated that the growth rate in the volume of data transmission over the past five years has been in the range of 50 percent annually (AT&T reply comments, page 35), and in the Computer Inquiry it estimated that data usage would amount to 5-10 percent of peak network load by 1980. Though AT&T does not indicate what proportion of this data growth and projected usage is interstate, the percentage of data usage by 1980 would be a comparatively small percentage of total usage even assuming that it were all interstate.[33]

81. While AT&T does not challenge the revenue figures used by the staff or those used by MCI, it claims that the staff erred in assuming that private line does not represent a significant portion of the use of existing or future systems. It may be, as alleged by AT&T, that private line service accounts for about 25 percent of AT&T's total interstate channel miles. However, the point raised in the staff's analysis is that the portion of AT&T's total business which might be jeopardized, i.e., the interstate private line business, represented only a very small fraction of Bell's total revenues. In terms of the total investment of the Bell System, the investment in all interstate circuitry is of much

[33] As noted in the *Notice* (paragraph 68), a number of Bell System companies are before various State Commissions seeking substantial increases in charges for information system access lines (to provide direct access to the customer information system through local exchange facilities) on the ground that these are high usage lines.

less significance than the 25 percent of interstate channel miles noted by AT&T as being devoted to the private line services. Moreover, the total private line circuit mileage usage includes television program transmission which is a relatively voracious consumer of interstate channel mileage. For example, from 600-1200 voice circuits can be derived from the bandwidth required for a single video channel (depending on the age and type of equipment utilized). We might also note that with the rapid growth in demand for circuitry for services other than private line, the rapid growth anticipated for the specialized services and the time frame which will be required for implementation of the plans of potential competitors, we cannot visualize AT&T being burdened with unusable quantities of circuitry for any significant period of time.

82. Most significantly, we see no reason whatsoever to assume that the applicants would divert all or even a substantial portion of that comparatively small percentage of existing and projected Bell System business that is vulnerable to competition.[34] As previously stated, the competition is for evolving, new, diverse and specialized needs in a dynamic, rapidly growing market. The applicants are seeking in large part to exploit latent demands and may well expand the size of the total communications market. Moreover, they are proposing very small scale operations compared to those of AT&T. MCI anticipates only about $55 million in total annual revenues from all of the MCI systems covered by applications on file at the time of its comments (Appendix C, page 3). Datran's proposed plant investment is only about $350 million, compared to AT&T's 1970 plant investment of approximately $54.8 billion and its investment programs of $7.7 and $8.2 billion

[34] Even assuming a 50% diversion annually (a figure we consider to be unrealistically high), the growth in regular voice service could absorb virtually all of the lost channels in one year.

for 1971 and 1972. Datran has indicated that it hopes to obtain about 10 percent of the data market by 1980. In addition, the introduction of new services and facilities by the specialized carriers would take place gradually over a period of time, with the volume paralleling the market growth in demand for specialized services. And, finally, AT&T is adapting to supply certain specialized services which have not been adequately provided in the past (e.g., its proposed digital data network), and is free to compete with the specialized carriers for the potential market. AT&T has vast competitive resources, and it is likely that it will succeed in obtaining a very substantial portion of the large potential market.

83. Accordingly, we find no reason to anticipate that new entry in the specialized field would result in any substantial diversion of AT&T's revenues or have any significant adverse impact on telephone users, the installation of large capacity systems to meet the growing communications requirements of all kinds, or the realization of declining unit costs. At best, any impact that new entry may have upon declining unit costs or economies of scale would be more than offset by the other advantages inuring to the public from such new entry. By the same token, there is no reason to believe that there would be any prejudice to AT&T's pace of technical and service innovation and national security role. On the contrary, we believe that new entry would act as a competitive stimulus to AT&T's innovative efforts.

84. The potential effect of new entry on other established carriers is, of course, a relevant factor to be weighed in our determination as to the over-all public interest. As the staff recognized (*Notice*, paragraph 43), the potential impact on Western Union is greater than for AT&T or the independent telephone companies. About 45 percent of its total revenues (and most of its profits) are derived from

leased systems and Telex, with the remainder coming from message telegraph service and other services. While a fairly large percentage of Western Union's service may be vulnerable to competition, there are other countervailing factors to be considered. Western Union's gross operating revenues have increased from $305 million in 1965 to $402.4 million in 1970. Despite the falling volume of message telegraph traffic,[35] Western Union has stated that its growth rate nationwide has been on the order of 14.8 percent (see footnote 24 above). We have recently approved Western Union's acquisition of TWX from AT&T, which will add an estimated $86 million in annual revenues. *In the Matter of Western Union Telegraph Co.* (Docket No. 18519), 24 FCC 2d 664 (1970). Moreover, Western Union's largest leased systems are switched systems (the Automatic Digital Network for the Department of Defense and the Advanced Record System), as though (though the latter also serves some point-to-point data customers). In our decision in Docket No. 18519, we noted (24 FCC 2d at 673):

> "No concern was expressed as to possible competition from a specialized carrier such as MCI because in Western Union's opinion, any effect would be at best, indirect in nature. Western Union did state that the impact from Datran would be more because of the proposed size of its

[35] While Western Union claims message telegraph service is a "profitless monopoly," it would not be fair to existing or potential specialized users or in the public interest to deny new entry needed in the specialized field merely in order to facilitate a bolstering of the message telegraph service through subsidy from Western Union's other services. The plight of the telegraph message has been a continuing and growing problem even in the absence of any new entry. The arbitrary exclusion of new entry into the developing market for specialized services is certainly neither a practical or a justifiable solution to the problem, assuming that a solution is called for in the public interest.

> operation. Western Union did not believe that this impact had to be fully considered before the acquisition of TWX, since the prompt implementation of an approval of the proposed acquisition itself would afford the company sufficient lead time in the market."

85. Most significant, however, is the circumstance that has been repeatedly stressed herein, namely that "we are here concerned with the sharing of a new, relatively untouched market in a field where even present demand is growing at a very rapid rate" (*Notice*, paragraph 34). The proposed services of the applicants are designed to meet needs not adequately met by the established carriers in the past. While Western Union's data/record oriented network may differ from AT&T's voice/video oriented network, it does not have a nationwide, switched, all digital end-to-end data network such as that proposed by Datran. Moreover, Western Union's existing plant and investment growth rates are not on a scale that appears sufficient to accommodate the very large potential market for specialized services — particularly for data transmission.[36] We cannot accept Western Union's contention that it should be the only carrier authorized to compete with AT&T. In our judgment, the potential market would be best served by

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[36] As Western Union noted, the staff analysis erroneously states that Western Union does not for the most part provide services on its own facilities, but instead provides such services by facilities acquired largely by lease or rental from AT&T. While this is true for local facilities, Western Union's Annual Report for 1969 (Schedule 400a) shows that it leased 38.9% of its intercity voice grade channel miles from others. We find that Western Union provides more than 60% of its intercity voice grade channel miles on its own facilities. The error is not of decisional significance. The fact remains that Western Union's gross plant investment and current investment program are very small compared to AT&T's (see paragraph 64 above). The public is now primarily dependent upon AT&T for the provision of communications services, including specialized services.

wider sources of competitive supply. Like AT&T, Western Union will have an opportunity to compete with new entrants on the merits of its own service offerings and facilities. If the public is attracted by what Western Union has to offer, it may retain most of its present specialized business as well as capture a sizeable share of the potential market.

86. In light of the foregoing, we are not persuaded that Western Union will necessarily suffer any substantial diversion of revenues or other detriment. In any event, we conclude that the need for, and public benefits reasonably anticipated from, new entry outweigh any potential dangers to Western Union.

87. As the staff pointed out (*Notice*, paragraph 42), it is difficult to visualize how independent telephone companies would be adversely affected. They participate in interstate service primarily by providing local distribution facilities and do not, with minor exceptions, furnish intercity facilities. To the extent that the new entrants rely on existing carriers for the provision of local distribution facilities, the business of the independents may increase. Indeed, GT&E has recognized this potential benefit by offering, with adequate lead time, to provide local distribution service for any authorized carrier, and by opposing the authorization of separate local distribution facilities (Appendix C, page 30).[37] Moreover, one of the applicants, Nebraska Consolidated Communications Corporation (NCCC), was formed, and is one-third owned, by independent telephone companies. NCCC states that the filing of their applications evidences the belief of these in-

[37] While USITA states that separate local distribution facilities would mean a loss of potential revenues to the independents, it expresses concern that the increased business derived from new entry might be offset by reduced settlements with existing carriers. Having found no reason to anticipate any substantial diversion of AT&T's revenues, we believe this concern to be groundless.

dependents that the specialized carrier concept has potential for contributing more and better communications without adverse impact on the existing operations of independent telephone companies (Appendix D, page 6; Transcript of Oral Argument, page 124).[38] We find no likelihood that the independent telephone companies would be prejudiced by a policy in favor of new entry.

88. Nor do we find grounds for excluding new entry in the miscellaneous arguments advanced by the carriers relating to "cream-skimming." Like the staff, we are not persuaded that the charge of "cream-skimming" is well-founded or would justify a bar against new entry of the type proposed here. The staff's analysis of this allegation (*Notice*, paragraphs 36-38) is reasonable, has further support in the points made by applicants (paragraph 36 above), and is not refuted in the comments of the carriers. We also agree with the staff's treatment of the "economies of scale" contention (*Notice*, paragraphs 33-34), and note further that AT&T apparently recognizes some advantage in specialization in view of its own plans for a functionally separate digital data network (AT&T reply comments, Appendix A, page 5).

89. In the event that new entry is authorized, AT&T and Western Union claim that they must be able to compete fully under explicit ground rules set forth by the Commission and to offer their services on competitive routes at rates competitive with those of the new entrants. Thus, AT&T alleges that new entry might require it to depart from cost averaging and uniform nationwide interstate rates. This approach to the pricing of AT&T's services in the past has been generally regarded as consistent with the

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[38] There are also independent telephone company ownership interests in two other applicants: Associated Independent Telephone Microwave, Inc., and Telephone Utilities Service Corp. (see Appendix A).

public interest in the context of the predominantly monopoly structure which heretofore has characterized the common carrier industry. There is no reason to believe that this approach to pricing of the interstate message service offerings of the Bell System and Western Union (such as MTT, WATS, and public telegraph) need be altered by new entry into the developing specialized communications market. Clearly, none of the uniform rate structures of the existing carriers for such services would appear to be in jeopardy since those services are not being challenged competitively to any substantial degree by the services proposed to be offered by the aspiring new entrants. Where services may be in direct competition, departure from uniform nationwide pricing practices may be in order, and in such circumstances will not be opposed by the Commission.

90. While asserting that there should be no cross-subsidization or temporary rate reductions, AT&T urges that the cost basis for pricing specialized services on competitive routes should be long-run incremental costs. The applicants claim that the only practical means for assuring that AT&T's rates for specialized services will be equitable and non-discriminatory is to require that rates for competitive services be based on fully allocated costs. We do not find it necessary at this time and on this record to speculate concerning the manner in which the existing carriers may seek to respond to competitive conditions that may emerge in the market for new and developing specialized communications services. We do, however, stress our objective to promote and maintain an environment within which existing and any new carriers shall have an opportunity to compete fairly and fully in the sale of specialized services. Our rate-making and regulatory policies and practices will be appropriately adapted to accomplish this objective. There is no reason to deny the public the benefits that may derive from active and vigorous participation by the Bell System and Western Union in this market, so long as their

participation is not a burden upon or significantly detrimental to their other services. Thus, it is our intention to permit the existing carriers to price their competitive services in a fashion that will realistically and reasonably reflect economic advantages, if any, that are inherent in the plant and operations of those carriers. Moreover, we subscribe fully to the views of our staff, endorsed by the Department of Justice, that there should not be any "protective umbrella" for the new entrants or "any artificial bolstering of operations that cannot succeed on their own merits" (*Notice*, paragraph 44).

91. However, it is neither practical nor appropriate on this record to attempt a formulation of the precise principles that will achieve the above objectives. The applicability of long run incremental and fully allocated costs in pricing monopoly and competitive services of the Bell System, as well as appropriate methodologies for ascertaining such costs, are the principal issues in our pending proceedings in Docket No. 18128. That proceeding involves a determination of the reasonableness of the over-all levels of earnings for each of AT&T's interstate services. The record in that proceeding, which is now well advanced, is focusing upon a Statement of Rate-Making Principles and Factors to which AT&T, Western Union, and other parties have stipulated. The Commission has not yet had occasion to pass upon the principles embodied in that Statement. However, we accepted the recommendation of the parties that effective testing of the complex economic theories of costing and pricing reflected by such principles "and the reconciliation of opposing, or at least partially conflicting, views of expert witnesses, can best be accomplished by relating the principles advocated to specific rate proposals" (*Memorandum Opinion and Order* released in Docket Nos. 16258, 15011 and 18128 on August 7, 1969, 18 FCC 2d 761, 763). The Commission also recognized that the Statement "properly recognizes the relevance of both fully distributed

and incremental costs in considering appropriate rate levels of specific classes of service" and, at the same time, noted that each party to the agreement reserved the right to assert the relevance of fully allocated costs, long run incremental costs or any other method of cost determination (18 FCC 2d at 763). Also, the Commission observed that: "The practical difficulties of accurately measuring incremental costs in a system as complex as the telephone industry have been recognized even by the advocates of incremental costs as a floor for pricing. Criticisms, likewise, have been directed to the use of fully distributed costs for pricing purposes. Moreover, some witnesses have advocated that public interest considerations could justify rate levels lower than might be supported by cost considerations alone, and one of the principles set forth in the stipulation (par. 12) provides for such a contingency." (18 FCC 2d at 763.)

92. A complete reading of the Commission's Memorandum Opinion and Order and the Statement of Rate-Making Principles to which it is addressed, will demonstrate the impracticability of attempting any definitive resolution in this proceeding of the complex and controversial issues involved in the pricing and costing of monopoly and competitive services. It would be therefore premature and improper for the Commission to express any opinion on that question in this proceeding, except to reaffirm our intention to follow rate-making principles and practices which will be compatible with the maintenance of a competitive environment. Moreover, the record in this proceeding has to do with the microwave applications of the would-be new entrants and the objections raised thereto. We do not yet have before us any tariff filings by the applicants or any revised tariff offerings by AT&T and Western Union in response to such tariff filings. However, we do contemplate full and fair competition in the specialized field among all carriers, both established and new, and will address any problems as they arise with due

regard when appropriate, for the pricing and costing principles and factors established by our proceedings in the aforementioned Docket No. 18128. We will not delay the institution of new specialized services, by existing or new carriers pending the outcome of that docket.

93. Finally, we have not overlooked the matter of efficient spectrum utilization. It appears likely that most of the proposed stations can be accommodated in the pertinent frequency bands, and that most, if not all, of the frequency conflicts can be removed through frequency coordination or some relocation of the proposed routes. In accordance with our usual practice, no application will be granted that would cause harmful electrical interference to existing common carrier facilities. We are requiring applicants to avoid blocking future expansion of existing carrier routes.[39] We are also adopting rules designed to achieve more efficient spectrum utilization by all new stations in these microwave bands (see discussion under Issue C, paragraphs 127-144 below). Moreover, efficient spectrum utilization is only one factor to be considered in evaluating the public interest. There are other important public benefits to be derived from affording new specialized carriers access to microwave frequencies (paragraphs 75-76 above), and we regard these considerations to be of controlling significance here.

94. To recapitulate, we find ample basis in the record and other material officially before us for the staff's conclusions as to the nature of the potential market, the public

[39] We note in this connection that AT&T is planning construction of high capacity L5 coaxial cable facilities on high density routes where frequency congestion is most likely to be encountered. Further, new applicants, who are not constrained by existing facilities, have greater flexibility to modify proposed routes to avoid frequency conflicts or blockage of expansion of routes of others. During the pendency of this proceeding, a number of applicants have filed modifications designed to remove initial conflicts.

need and demand for the proposed services, the public benefits that may reasonably be anticipated from new entry, and the effect on existing carrier service to the public. Beyond bare, general assertions that the staff analysis rests on untested and unsupported assumptions, the carriers have not offered anything to indicate that the staff's conclusions are erroneous. We have twice sought to ascertain whether the carriers possessed any information, not contained in their filings, which might cast doubt on the validity of the staff's conclusions or warrant exploration in evidentiary hearing. No such information has been forthcoming.

95. In our order designating this matter for oral argument (FCC 70-1339, released December 18, 1970), we requested parties "to address the question of what, if any, specific information would be adduced in any evidentiary hearing which is of material importance and has not been, or could not have been, filed in the record of this proceeding." In response, AT&T stated that there is a need for cross-examination: to pinpoint what proposed services are not now provided by established carriers, to examine the applicants' market studies more critically to see if they support the need for the proposed services, to determine the exact size and nature of the asserted market, and to ascertain whether the applicants' proposed systems are technically adequate for their intended uses and reasonably calculated to meet the need.[40] AT&T further stated that it would offer evidence as to the nature and extent of the existing and future services and facilities of the Bell System, its studies as to the market for the proposed services and the effect of new entry on its service and rate structures, as well as on national security and balanced economic development. Western Union stated that the primary ob-

[40] The technical adequacy of the applicants' proposals is a matter to be considered when the applications are processed, and is not involved in this proceeding.

jective of an evidentiary hearing would be to examine the public need and demand for the proposed services. While not specifically proposing to offer any information, Western Union asserts that evidentiary hearings would enable it to prepare more comprehensive studies as to the dimensions of the market and give it an opportunity to show whether the applicants' forecasts are wrong or right.

96. In addition, by letters dated October 28, 1970 and December 11, 1970, the Chief of the Common Carrier Bureau requested AT&T and Western Union to supply full information concerning any data market studies they might have made. The letter to AT&T noted that Mr. William H. Ellinghaus, then Executive Vice-President, had announced in an address on August 31, 1970 that the "most extensive, most detailed study of the data market ever made" by AT&T was nearing completion. In its reply on November 23, 1970, AT&T said it had only began the accumulation of raw data and that no meaningful conclusions could be drawn at that time. AT&T further indicated that considerable time and manpower would be required to conduct the study and to assimilate the data into meaningful and usable form. Moreover, since the data study is structured to aid the Bell System in planning services for the data market, much of the information collected would be proprietary and could not appropriately be made public — though it might be supplied to the Commission on a privileged basis. Western Union's reply on January 13, 1971 indicated that it had studies in progress, relating in part to the future requirements of the public for communications facilities and services, and expected such studies to be completed in mid-1971. Western Union further stated that after the data from these studies have been analyzed, it would be willing to meet with the Commission to discuss what results might be made available.

97. We are compelled to several conclusions. First, at the time of their comments, reply comments and oral argument

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in this proceeding, AT&T and Western Union had not progressed in their own market studies far enough to draw any meaningful conclusions and had no basis in such studies for challenging the forecasts made in the numerous studies completed by others. Second, even after their studies have been completed and the data analyzed, much of the information collected would be proprietary and could not appropriately be made public. We think it apparent that the same sould hold true for the market studies of the applicants. It is not necessary for us to conduct evidentiary hearings in order to receive proprietary information on a privileged basis. Nor do we see any public purpose to be served by according the established carriers an opportunity to elicit through cross-examination any proprietary marketing information of their would-be competitors.

98. Third, and most important, we find that there is no need to explore the various market studies more critically through evidentiary hearing and cross-examination or to obtain any proprietary information on either a privileged or a public basis. In our opinion, such a procedure would lose the Commission in a counterproductive excursion into detail that would obscure rather than clarify the fundamental issue (*WBEN, Inc. v. United States*, 396 F.2d 601, 617, 618 (C.A. 2, 1968), *cert. den.* 393 U.S. 914). There is no dispute, even from the established carriers, that the potential market is sizeable and apt to expand substantially over the next decade. All of the market studies, surveys, public comments and other material before us point in that direction, and there is no indication to the contrary (see paragraphs 65 through 68 above). The market studies on behalf of the applicants were conducted by reputable research organizations and our economists have found no apparent reason for questioning their methodology. We think that the general thrust of all of the market studies, taken together and in light of the record as a whole, is entitled to substantial weight as indicating that there is a

potential heterogeneous market of sufficient size to make competition in the specialized field reasonably feasible, and that there is substantial public need and demand for the proposed services.

99. We see no need to go further. We do not rely on any particular market study as reflecting the probable extent or precise nature of the potential market. It is not essential to our policy determination here to make findings as to the exact size of the potential market or the precise breakdown of the various latent submarkets that might be stimulated and developed by new entry. Factors of this kind do not lend themselves to precise prediction, and we would not undertake to make definitive findings as to such future developments even if we were to hold an evidentiary hearing. That the applicants perceive and are concentrating upon different forms of potential growth is a proper exercise of entrepreneurial discretion in a competitive arena where the potential market is characterized by diverse user demands and requirements. Indeed, the basic point here is that the potential market is not standardized, but heterogeneous (see *Notice*, paragraphs 29, 33).

100. We cannot conclude that the convenience or interest of the public would be served by subjecting all of the public parties to this proceeding (as well as those potential users submitting letters with the applications) to cross-examination on their expressed views and desires, as suggested by AT&T. The record compiled here and in the Computer proceeding is adequate for our purposes, and we deem the rule making procedure to be a more appropriate vehicle for public participation on that scale. Moreover, we see no need for cross-examination to pinpoint precisely what proposed services are not now provided by established carriers. It is clear that the proposed facilities and services of the applicants have several technical and service offering features which are different from those now provided by the established carriers (see paragraphs 69-71 above). The cir-

cumstance that there are undoubtedly some areas of overlap or similarity is not of decisional consequence here (paragraphs 72-74 above). Further, we have found that other potential benefits may reasonably be anticipated from new entry in the specialized field (paragraphs 75-76 above).

101. Finally, we find no need for evidentiary hearing to receive evidence as to the past, present and future operations of the Bell System. AT&T has already placed voluminous material on that aspect in the record of this proceeding (AT&T comments, pages 47-80 and Appendices A-E; AT&T reply comments, Appendix A). Moreover, we are familiar with AT&T's operations from its tariffs, reports, etc. in our files and from our longstanding regulatory relationship. We concede that AT&T has served the nation well and are confident that it will continue to make every effort to do so. It is nevertheless our judgment that the public interest, convenience and necessity would be served by new entry in the specialized field in the circumstances here.

102. Accordingly, we conclude that the record before us affords sufficient basis for a policy decision on the merits of Issue A (with the exception noted above), and that there is no need for evidentiary hearing on the broad issue of whether the public interest would be served by a general policy in favor of new entry in the specialized communications field.

d. Findings and Conclusions

103. In light of all of the foregoing and the record as a whole, we adopt our staff's analysis of Issue A, as amplified and modified herein. We find that: there is a public need and demand for the proposed facilities and services and for new and diverse sources of supply, competition in the specialized communications field is reasonably feasible, there are grounds for a reasonable expectation that new en-

try will have some beneficial effects, and there is no reason to anticipate that new entry would have any adverse impact on service to the public by existing carriers such as to outweigh the considerations supporting new entry. We further find and conclude that a general policy in favor of the entry of new carriers in the specialized communications field would serve the public interest, convenience, and necessity.

104. Our policy determination is based upon the circumstances shown by the record before us, and any future proposals for new entry will be considered in light of the circumstances then pertaining. However, we do make clear that we will examine very critically any future opposition by the pending applicants to proposed new entry by others.[41] We further stress that our policy determination as to new specialized carrier entry terrestrially, does not afford any measure of protection against domestic communications satellite entry or otherwise prejudge our determination in Docket No. 16495 as to what course would best serve the public interest in the domestic satellite field.

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[41] We cannot help but note several curious coincidences. There was once a time, almost a century ago, when Western Union was the dominant domestic carrier, and Bell was assaying new entry. It has been asserted that Western Union initially sought to make things difficult for Bell by every means at its disposal. Long after Bell outpaced Western Union to become the predominant carrier, they joined forces to oppose the authorization of private microwave systems, raising essentially the same arguments here asserted against new specialized carrier entry. *Allocation of Frequencies in the Bands Above 890 Mc.* 27 FCC 359, 411-412 (1959); 29 FCC 825, 848-855 (1960). Among the pending specialized applicants, it is only those who are existing miscellaneous carriers or affiliated with such carriers that claim economic exclusivity and seek comparative hearings to exclude other applicants.

B. Issue B: Whether comparative hearings on the various claims of economic exclusivity among the applicants are necessary or desirable in the circumstances.

1. *Proposals in the Notice*

105. In the *Notice*, it was proposed not to hold comparative hearings on claims of economic exclusivity among the applicants unless there is a much stronger showing of exclusivity than those presently before us and we are persuaded that the public interest requires such action in the particular situation (*Notice*, paragraphs 46-50b). In any event, we proposed to consider Datran's proposed system separately, since it alone has proposed a switched, all digital, end-to-end, occasional use, nationwide network exclusively for data transmission (*Notice*, paragraph 47).

2. *Positions of the Parties*

106. Of the 33 applicants now pending before the Commission, only four have claimed economic exclusivity and requested comparative hearing. These four are: Western Tele-Communications, Inc. (Western); United Video, Inc. (United Video); West Texas Microwave, Inc. (West Texas) and CPI Microwave, Inc. (CPI). All but CPI (which is affiliated with West Texas) are miscellaneous common carriers presently providing video service primarily to CATV systems. West Texas and CPI propose routes solely within the State of Texas. United Video's proposed routes run from Minneapolis-Chicago-Texas and from New Orleans to Chicago, serving different intermediate points. Western's proposed routes are in several Western States (Utah, Nevada, Colorado, Nebraska, South Dakota, Iowa, Minnesota), on the West Coast (partly through interconnection with another West Coast applicant, Microwave Transmission Corp.), and from Los Angeles and

other western cities (Denver, Dodge City, Wichita, Topeka, Tulsa, Oklahoma City and Kansas City) to Texas.

107. West Texas and CPI claim that there is room for only one new entrant in Texas and that a comparative hearing is necessary because there are two other competing applicants for West Texas routes and seven for CPI routes, in whole or in part. They also urge that Datran should not be treated separately. United Video states that there are 4 or 5 other applicants on portions of its routes and claims that some form of expedited hearing or arbitration is essential to select among applicants where the projected volume of traffic does not justify several new entrants. Western urges the Commission to determine the economics of exclusivity along routes or in areas where there is more than one applicant. As an alternative, Western proposes that existing video carriers be authorized to construct and provide the proposed services along their existing routes for a test period, in order to provide information to assist a Commission determination as to how many new entrants should be permitted on the route.

108. The position of the foregoing applicants is supported by Western Union, GT&E, and United Telephone System. They claim that under Section 214 of the Act, the Commission is required to determine the need for each applicant and the amount of competition that is reasonably feasible on individual routes. They further assert that if too many new entrants are authorized and some go bankrupt, the public will be injured through loss of investment, the inconvenience to users of switching to another carrier, and the possibility of users being left with incompatible terminal equipment.

109. The other 29 applicants have either affirmatively stated that they do not desire comparative hearings on economic exclusivity, or have not opposed the Commission's proposal or sought comparative hearing. Those

commenting claim that their market studies show a sizeable potential market and, in any event, the marketplace is the most appropriate test of who will best serve the public. They further urge that the four applicants requesting comparative hearing have not made any adequate showing as to the need for comparative hearing on their proposed routes or other routes. Although the four applicants speak vaguely of studies and conclusions that various markets will support no more than one or two new entrants, they have not come forth with such studies. An applicant claiming that there is need for only one new entrant should have the burden of showing that the market is so limited before other applicants, who think the market will support them, are all forced into a hearing. Moreover, even if some encounter difficulty, the result will not necessarily be bankruptcy but is more likely to be merger with a stronger competitor with little adverse impact on anyone. Users can always shift their business to the remaining carriers (including AT&T and Western Union) and any inconvenience is a reasonable price to pay for competitive options. Finally, they assert that it is unlikely that comparative hearings would enable the Commission to make definitive findings as to the precise character and size of the potential specialized market on the affected routes or that they would otherwise be worth the delay and burden.

110. The Department of Justice takes the same position. It states that according to present law, hearings on economic exclusivity issues need be held only if the party who petitions for such a hearing meets the heavy burden of showing that there is so little revenue in the market that the contemplated amount of new entry would make it impossible for either new entrants or established carriers to remain financially strong enough to render adequate service to the public. *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440, 443 (C.A.D.C., 1958); *Delta Airlines v. CAB*, 275 F.2d 632, 638 (C.A.D.C., 1959). The objecting party must

make a *prima facie* case that the new competitive certifications "would as a matter of economic fact destroy or substantially reduce the rendition of the service required by the public interest * * *." (*Delta Airlines, supra.*) The burden of proof is on the party asserting economic exclusivity (*Eastern Airlines, Inc. v. CAB*, 271 F.2d 752, 756-757 (C.A. 2, 1959)), and the Commission has discretion to deny comparative hearings if the statistics concerning supply and demand do not dictate the inference of economic exclusivity (*Frontier Airlines, Inc. v. CAB*, 349 F.2d 587, 590 (C.A. 10, 1965)). Given the rapidly growing character of the computer data field and the large number of specialized submarkets within the field (based on a variety of considerations including bandwidth, circuit quality and transmission method), a protesting carrier in this field would have a very heavy burden in making out a case for mutual economic exclusivity requiring evidentiary hearing.

111. The Department further states that the antitrust laws do not impede a "merger between two small companies to enable the combination to compete more effectively with larger corporations dominating the market, nor a merger between a corporation that is financially healthy and a failing one that can no longer be a vital competitive factor in the market." *Brown Shoe Co. v. United States*, 370 U.S. 294, 319 (1962); *United States v. Diebold, Inc.*, 369 U.S. 654 (1962); *Citizens Publishing Co. v. United States*, 394 U.S. 131 (1969). The Department urges that merger or sale of facilities to another competitor is a more likely fate for an unsuccessful entrant than bankruptcy or removal of facilities in this field. It states that this alternative would minimize customer inconvenience, and under *Carterfone* (13 FCC 2d 420) the successor would be required to permit continued use of customer terminal equipment unless there is a risk of network harm.

112. AT&T, which also supports the position of the bulk of the applicants on Issue B, states that if the Commission

were to adopt a policy of new entry based on the staff analysis of Issue A, it "would be inconsistent with the essential rationale of that decision for the Commission then to attempt to select between and among would-be competitors, either new carriers or existing carriers." AT&T further asserts that if (contrary to its belief) the staff's position on Issue A is correct, it can only be so because the alleged benefits of injecting competition in the specialized markets outweigh the probable disadvantages. These benefits cannot be realized if the ensuing competition is hampered by regulatory restrictions, or if the Commission "acts as a handicapper imposing artificial barriers to entry into this competitive area or shackling one would-be competitor in favor of another." In its rebuttal comments AT&T notes how illogical it would be to hold that two carriers (AT&T and Western Union) are not enough, three would be all right without question, but four or more would be a crowd.

3. Discussion and Conclusions

113. Upon review of the record, we are inclined to adhere to our initial view that it would be contrary to the public interest and inconsistent with our policy determination on Issue A to attempt generally to limit entry among the pending applicants by holding comparative hearings on issues of economic exclusivity. We have concluded that the public interest would be served by affording users flexibility and a wide range of choices as to how they may best satisfy their expanding and diverse specialized requirements. Moreover, the applicants are seeking to develop a relatively new and potentially very large market, with heterogeneous submarkets, and there are technical and service differences among their proposals. In the circumstances presented here, we would be reluctant to take any action that might restrict entry unduly, and would not undertake to select "chosen instruments" unless we are

persuaded that such a course is necessary to protect the public from significant adverse consequences.[42]

114. We are not presently confronted with the situation posited in some of the arguments—twenty or so applicants seeking to serve the same route with precisely the same services, and facilities. In the Eastern portion of the country, the number of applicants is relatively few—only one or two (aside from Datran) for any particular route or area, and there are no claims of economic exclusivity. There are also only a few applicants for routes in the Western mountain and plain states. While there are a multiplicity of applicants in the Central states, proposing service to some points in common, most propose different intermediate points and extensions to points not included in the proposals of others. The two areas with the largest number of proposed new routes (exclusive of Datran) are the Pacific Coast, where there are four, some of whom propose different intermediate points,[43] and Texas, where there are eight. Three of the Texas applicants propose service solely within that State, whereas the others propose to serve other States as well. Moreover, the routes within Texas vary to some extent.

115. The service and facilities proposed by Datran are markedly different from those proposed by any other applicant. It alone has proposed a switched, all digital end-to-end network (including digital local distribution facilities) exclusively for data transmission. Its proposal would permit

[42] From the standpoint of potential economic impact on established carriers, we fail to see how it makes much difference whether such specialized traffic as they do not obtain is spread among a larger or a smaller number of new carriers. Moreover, we have already rejected (paragraph 52 above) the contention that impact on established carriers should be considered on a piecemeal, route by route, basis.

[43] One of the original Pacific Coast applicants, Astron Corporation, has dismissed its applications since the issuance of the *Notice*. Another of the Pacific Coast applicants is affiliated with Datran.

occasional use by those with small requirements. The other applicants have all proposed point-to-point, rather than switched, service to meet the private line requirements of the bulk user. They would offer a variety of specialized services, including but not limited to data transmission, primarily aimed at offering subscribers flexible, low-cost communications channels adaptable to the particular needs of each. Their proposed transmission mode is analog or analog/digital rather than all digital. Moreover, they are proposing to achieve local loop service by a variety of means, including interconnection with local telephone exchange facilities and customer-provided facilities, as well as—in some instances—new construction by the applicant. In light of these and other differences between the two types of proposals, we conclude that the public would benefit by the availability of both kinds of service from new entrants. While there may be mutual impact between the two types of proposals insofar as data transmission is concerned, it does not appear that a grant of Datran's application would preclude an opportunity for entry by one or more private line carriers in view of what the record as a whole shows as to the size and heterogeneous nature of the potential market and submarkets. Accordingly, we have decided to treat Datran's proposal separately from those of the other applicants.

116. The proposals of the private line applicants do not vary among themselves to the degree that they differ from Datran. However, there are differences in geographical scope. The MCI carriers propose a nationwide, interconnected network, which they estimate would be accessible to 75 percent of the population and 85 percent of the business community in the United States. Others, like Southern Pacific, Western and United Video, propose routes crossing very large regions. Some, like several of the Texas applicants, propose service in only one or two States. The circumstance that their proposals are basically similar

in that each is offering to provide "customized" services tailored to the requirements of individual subscribers, does not mean that each would evolve with identical facilities and services in the areas of overlap. As we recognized in the *Notice* (paragraph 49):

> Various systems may develop along different lines, each offering something of value to the public which would attract sufficient customers for viable operations. The number of successful operations may well depend on the ingenuity, enterprise and initiative of applicants and equipment manufacturers over a period of years in taking advantage of changing circumstances and in coming up with the types of services and equipment that will attract sufficient business to support the particular system.

117. The four applicants claiming economic exclusivity have not made any substantial *prima facie* showing that the potential specialized market along any particular route is so limited as to support only private line entrant. They make general assertions to that effect, purportedly reflecting business judgments based on their own market studies and surveys. However, they have not shown that such efforts were as comprehensive or aggressive as those of other applicants or that they have approached all of the potential users in the particular area. Nor have they demonstrated any *prima facie* reason for suspecting that the differing business judgments of other applicants are in error. We have found a general public need and demand for the proposed services in all areas. Where a majority of the applicants for any particular area or region are willing to proceed now in the face of competition by others, it would appear contrary to the public interest to delay the institution of needed new service in that area merely in order to afford one or two applicants an opportunity to show that new entry should be limited to one.

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118. The record as a whole, including all of the various market forecasts, indicates that entry by more than one private line carrier should generally be reasonably feasible, in view of the large potential market and its heterogeneous character. In this connection, it is pertinent to note that the proposed plant investments and revenue requirements of the private line applicants are not of a magnitude anywhere near those of an AT&T or even a Western Union. The total proposed initial investment of all of the pending private line applicants is on the order of $175 million, including multiplexing equipment but excluding local distribution facilities.[44] MCI anticipates that total gross operating revenues for the MCI carriers would come to about $55 million in the first year. Nebraska Consolidated Communications Corporation expects to derive annual operating revenues of approximately $900,000 from only two out of the 50 or so potential customers it hopes to serve. When we authorized MCI to modify its Chicago-St. Louis route, our staff noted that with a loading of approximately 375 out of the potential 1800 channels, that route would produce over a 25 percent return on invested capital in the first year.[45] Thus a comparatively small share of the potential market may result in financially successful operations

[44] Datran's proposed investment of about $350 million includes local distribution facilities (amounting to about half) and other costs such as switching equipment. If Datran succeeds in its goal of serving about 10% of the data market by 1980, and this is sufficient for successful operations by it, there should be ample room for more than one private line entrant providing other services as well (even assuming that AT&T and Western Union garner a substantial share of the remaining 90% of the data transmission market).

[45] The staff's comment was based on MCI's projected revenues and costs, *MCI Communications, Inc.* (File Nos. 5422-5423-C1-MP-70), Comments and Recommendations of the Common Carrier Bureau, pp. 4-5, 13, fn. 12.

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for any one applicant, and a number of small but viable carriers may be able to co-exist in any particular region.

119. Further, and more important, we do not perceive any significant adverse consequences to the public in the event that one or more of the entrants should fail. In the first place, as the Department of Justice and other parties point out, if a weaker entrant should encounter difficulty, a merger with, or sale of facilities to, a stronger competitor is a more likely fate than bankruptcy or a removal of facilities from the field.[46] Even assuming bankruptcy, the loss of a carrier who is unable to attract sufficient customers for viable operations in a competitive market of substantial potential size is not a matter of great moment to the public at large. The demand for this type of communications service would undoubtedly be met by another entrant or an established carrier, and the frequencies would revert to the Commission for assignment to others.[47] Any remaining customers could transfer to another carrier at what appears to be minimal inconvenience, and such carrier would be required to permit continued use of customer terminal equipment unless there is a risk of network harm. *Carterfone*, 13 FCC 2d 420 (1968). Loss of investment to any

[46] The Department states that the anti-trust laws would not impede such a merger or sale of facilities.

[47] As indicated in the *Notice* (paragraph 50a), if it should turn out that the market is spread so thin among the new entrants as to adversely affect their service to the public in that area, we can take remedial action by rule making or comparative hearings at license renewal time. We do not find it necessary to reach AT&T's contention that a Section 214 authorization, once issued, cannot be revoked. These carriers cannot operate without microwave radio licenses, and the Communications Act requires a public interest, convenience and necessity finding for any renewal of license under the circumstances then pertaining. In the very unlikely situation that all of the new applicants fail, the public would be no worse off than it is today. Its sole sources for the provision of specialized communications services would be the established carriers.

failing entrant is a normal business risk in a competitive situation. While this factor may be important where we are concerned with basic communications services upon which the general public depends, it does not outweigh the public interest and convenience in having a wide range of choices for private line users in satisfying their specialized communications requirements. As stated in paragraph 90 above, we do not contemplate any "protective umbrella to the competitors" or "any artificial bolstering of operations that cannot succeed on their own merits." (*Notice*, paragraph 44.)

120. In light of the foregoing, we conclude that it is not necessary or desirable in the public interest to hold comparative hearings for the purpose of restricting new entry in any particular area to only one private line applicant. A question remains as to whether we should nevertheless undertake to place a ceiling on the number of new entrants in any given area, and to hold further proceedings to determine how many and who should be selected.

121. For many of the same reasons just discussed, we do not think that the public interest calls for this course in the present circumstances. There may be too many applicants for viable operations by all in some areas (e.g., in Texas or the Pacific Coast). We do not yet know whether all of the pending applicants will be found qualified and, if so, will elect to proceed.[48] However, if an applicant is found qualified, obtains the necessary financial backing, and makes a business judgment to risk that investment in competition with such of the pending applicants as may be authorized, we are not inclined to place further obstacles in

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[48] In order to avoid the possibility that an applicant may obtain a grant and tie up frequencies while deciding whether or not to proceed, we will strictly adhere to Section 21.33(b) of the rules and will grant no extension of construction permits except for good cause shown, including a showing that construction is substantially underway.

its path. Moreover, since new entry by more than one private line applicant appears reasonably feasible in a potential market of this nature, we deem the marketplace to be a more reliable and effective instrument than the comparative hearing process for determining how many and which new entrants may succeed. Considering the desirability of avoiding delay in the institution of services needed by the public now, the benefit to the public in the availability of diverse options, and the lack of public detriment in the event some fail, we will decline to hold such hearings on the pending applications.

122. Our policy determination under Issue A rests essentially on our judgment, based on circumstances shown by this record, that competition is reasonably feasible and offers benefits to the public such as to outweigh any risk that some new entrants may fail. We would be very reluctant at this time to foreclose future applicants from an opportunity to compete with the present applicants, perhaps with a different or better service or by developing a new submarket. As in the case of any policy or rule, the policy adopted here is, of course, subject to review in the light of changed circumstances and may be altered if it no longer comports with the public interest, convenience and necessity. See *American Trucking, supra* (paragraph 57 above). We will examine future applications in light of the circumstances then shown, including any experience to date with operations of the pending applicants, and will take such action as is necessary in the public interest.[49]

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[49] Under the Commission's rules (Section 21.30(b)), the time for filing new applications for consideration with the pending applications has long since expired, and any new applicant would not be entitled to comparative consideration except at license renewal time. Modifications in the pending applications to achieve compliance with the technical standards and rules adopted herein, will not subject these applications to a new cut-off period for the filing of competing applications. See also

(continued)

C. Issue C: Frequency and Route Coordination; Spectrum Conservation

1. Terrestrial versus Satellite Systems

123. Except for some stations, the applicants are generally proposing to use frequencies in the 6 GHz common carrier band (5,925-6,425 MHz), which is shared with the communications satellite service (as an up-link). We expressed some concern in the *Notice* as to whether applicants for domestic communications satellite systems would experience difficulty in coordinating earth stations with terrestrial systems in the band, and recognized that the specialized carrier applications might complicate any problem. However, we did not propose to deny the new entrants access to this band on that ground, in view of the magnitude of the existing terrestrial usage, the possibility of additional frequency bands for satellite usage, and our belief that established and new carriers competing in the provision of terrestrial services should not be placed in unequal positions with respect to access to frequency bands. (*Notice*, paragraphs 51-52.)

124. The Communications Satellite Corporation has requested us to defer a resolution of this proceeding pending a decision in Docket No. 16495 on the domestic communications satellite applications. However, we do not think that such a course is necessary or in the public interest. The domestic satellite applications on file have already been coordinated with all of the stations proposed in previously filed terrestrial microwave applications, as well as with existing stations (*Report and Order* in Docket No. 16495, Appendix D, 22 FCC 2d 86, at 135).[50] Moreover,

[49] (continued)
paragraph 135 below. Moreover, under normal processing procedures, no new application would be processed until processing of the pending applications has been completed (except for any hearings that may be required).

the satellite applicants have found what are purported to be interference-free locations for earth stations to operate in the 4 and 6 GHz bands reasonably close to the cities to be served (including the nation's largest cities where congestion is most severe). Thus, the problem of satellite-terrestrial sharing in the 6 GHz band does not appear to be as serious as was feared at the time of the *Notice*. Although some of the applicants have proposed the use of the additional frequencies and additional frequency allocations are being considered at the World Administrative Radio Conference for Space Telecommunications (Geneva, June-July, 1971), there is no proposal to preclude the use of the 4 and 6 GHz bands for domestic satellite systems. Our action here is not prejudicial to a resolution of the issues in Docket No. 16495 (see paragraph 104 above), and we decline to grant the requested delay.[51]

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[50] Most of the satellite applications were filed after most of the terrestrial applications. The coordination did not include the comparatively few later-filed specialized carrier applications, and some of the satellite applicants have not yet applied for all of the earth stations contemplated (a good many of which would be receive-only stations in the 4 GHz band). However, we would anticipate no serious problem in view of the experience to date.

[51] While the specialized carrier applicants and the domestic satellite applicants may be seeking, in part, to attract some of the same markets, the emphasis appears to differ. The specialized carrier applicants are concentrating on data transmission and private line services, whereas, Comsat, for example, has proposed: (1) to lease satellites to AT&T, and (2) to establish a multi-purpose system in which television program transmission would play a major role. Most of the other satellite applicants are also proposing, *inter alia*, television program transmission service to broadcast stations and/or CATV systems. MCI Lockheed Satellite Corporation has proposed a multi-purpose system which would complement rather than duplicate the proposed terrestrial services of the MCI carriers. In any event, the terrestrial and the satellite technologies each offer special advantages, and we have already concluded in Docket No. 16495 (22 FCC 2d at 88-90) that both should be available to the public — though the nature of the domestic satellite systems and the identity of the licensees to be authorized are questions still to be determined in that proceeding.

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125. In order to avoid possible interference to any domestic or other satellite system that would share the 6 GHz common carrier band (5925-6425 MHz) with terrestrial carriers, we proposed to prohibit the transmitting antennas of terrestrial facilities operating in that band from being aimed within two degrees of the synchronous (geo-stationary) satellite orbit.[52] There was general support for and no opposition to this proposal. Accordingly, it will be adopted with the provision, as proposed, that exceptions can be made under unusual circumstances. In such instances, we would expect the applicant to submit a thorough engineering evaluation of possible impact on any authorized or proposed satellite operation, as well as to propose operation on a reduced power basis.[53] We are not aware of any existing facilities which will be in violation of this new requirement. However, if they do exist, we will not require them to be modified unless and until it is shown that they are likely to cause interference to authorized satellite facilities.

126. Possible interference to terrestrial facilities from satellite transmission is generally not considered very likely. However, since the satellite down-link and terrestrial facilities share the band 3700-4200 MHz, we discourage the pointing of receiving antennas in that band within 2° of the

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[52] Methods of calculating azimuths to be avoided may be found in: CCIR Report 393 (Green Books), New Delhi, 1970, and in *Radio-Relay Antenna Point for Controlled Interference with Geostationary Satellites*, by C.W. Lundgren and A.S. May, Bell System Technical Journal, Volume 48, Number 10, December, 1969. The first reference is an approximate, graphical method of calculation while the second is suitable for computer calculation.

[53] The maximum value of equivalent isotropically radiated power should not exceed: (a) 47 dBW for any antenna beam directed within 0.5° of the stationary satellite orbit, or (b) 47 to 44 dBW, on a linear decibel scale (8 dB per degree), for any antenna beam directed between 0.5° and 1.5° of the stationary orbit. These values are subject to possible revision as satellite operations develop further.

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stationary orbit (taking into account atmospheric refraction) to preclude possible future problems which may occur because of increased satellite transmission power or other reasons.

2. Terrestrial frequency conflicts and route blockage

127. Aside from the question of terrestrial versus satellite system coordination, the applications and opposition pleadings raise issues as to conflicts in terrestrial frequency usage and spectrum conservation. The established carriers claim that some of the proposed stations of the applicants would cause interference to their existing systems and block or impede economical expansion on existing microwave routes. There are also instances of frequency conflicts and potential interference among the applicants themselves. Based on past experience, we believe that most, if not all, of the claimed conflicts can be resolved through coordination and that new entry can be technically accommodated despite the growing frequency congestion. In order to facilitate such accommodation and future growth by all carriers, as well as to promote better coordinated and efficient use of spectrum, we proposed several measures in the *Notice*.

128. First, we proposed to amend our rules to require applicants, prior to filing, to coordinate the technical aspects of their proposals with other authorized carriers and applicants with previously filed applications in the same general area, to avoid frequency conflicts and blockage of planned future route expansion to the extent possible (*Notice*, paragraphs 56-58). In this connection we also raised a question as to whether standards for protecting the expansion potential of major routes should be prescribed and, if so, what standards.

129. In the comments, the concept of prior coordination received general approval. An exception is GT&E. It urges

the continuation of the present procedure (with minor modification) whereby other users are advised of new proposals by our public notice of applications filed, but the reasons for its opposition to mandatory prior coordination are unclear. A number of existing carriers state that they now coordinate frequency usage with other carriers in their areas of operation and have found the procedure mutually beneficial. Datran supports the procedure, but expresses some concern that in cases involving disagreement (e.g., a competitive situation) there may be less inclination to resolve technical conflicts promptly. The Department of Justice also agrees to prior coordination, but states that the Commission should make it clear that such meetings are to be limited to technical matters and that no attempt should be made to use coordination as an attempt to divide up markets or customers. It suggests that the Commission may want to consider the possibility of requiring coordination meetings to be held publicly in the presence of Commission staff and other affected parties, with final agreement in writing.

130. On the question of route blockage there is agreement that some attempt should be made to protect existing growth routes to provide for future expansion. However, no one recommends any particular standard to apply in such cases. AT&T suggests that heavy routes be protected by utilizing block frequency allocation, but it offers no details or advice on resolving the substantial number of problems that would be entailed in such a far reaching plan.

131. In view of these comments we conclude that mandatory prior coordination would be beneficial. We believe that such procedure will not only reduce the frequency conflicts that lead to the filing of petitions to deny applications, but will also enable the various carriers to use the limited frequencies more effectively in their particular areas of operation. The planning of new routes is especially im-

portant, and we urge such carrier applicants to make preliminary coordination to avoid extensive engineering expenditures where an alternative route may be required to prevent blockage of an existing route or to resolve other technical problems. However, we want to emphasize that such coordination meetings are to be used only to discuss technical matters and that any attempt to utilize such encounters, either directly or indirectly, for anti-competitive or market dividing purposes will not be tolerated. Moreover, the coordination representatives for each carrier or applicant should be technical personnel without overall policy making or marketing authority.[54]

132. In order to facilitate coordination, the names of the coordination representatives should be made available to all other carriers or known applicants in the same general area of operation. We will expect each carrier or applicant to use its best efforts to review proposals submitted for coordination within a reasonable time (determined primarily by the size and complexity of the proposal) and to attempt to resolve technical conflicts in good faith without regard to competitive circumstances. If coordination is not completed within a reasonable time, we will make provision for an applicant to file its proposal with an explanation of the circumstances. One other point we wish to make clear is that we do not intend, by the device of coordination, to give one carrier a veto power over another's technical proposal. If the problem cannot be resolved, the application(s) may be filed with a brief explanation of the dispute. If the objecting carrier deems the matter to be of sufficient im-

[54] We do not believe that it is necessary to go so far as having a Commission representative present at each meeting or having the results of any agreement reduced to writing, as suggested by the Department of Justice. Voluntary coordination has been employed for a number of years, and we have no evidence that illegal collusion has ever occurred. Also, we believe that the limited availability of Commission staff and the formality of written agreements would tend to hinder swift and effective coordination efforts.

portance, it may, of course, file a petition to deny or an informal objection. In accordance with long-established practice, the Commission does not grant any application where it is aware of likely interference to any authorized station.

133. To facilitate coordination several parties suggest that the Commission adopt technical standards involving interference calculation and specified frequency plans, among others. Western Union points out that while standards are presently determined unilaterally, there is no significant disagreement among established carriers, except with regard to digital and analog/digital systems for which standards have not yet been fully developed. Several other carriers, including AT&T, similarly oppose the development of these standards. We can appreciate the desirability of uniform standards, but we also recognize that each system must be designed to meet various performance requirements and to utilize various transmission techniques (some of which are relatively new). The design, of course, must also take into account a wide variety of existing facilities. We believe that the establishment of such technical standards would involve the Commission too deeply in system design to the detriment of design flexibility. Therefore, we will decline to develop standards of this type at this time. However, if it later appears that standards may be necessary, we will reconsider the matter.

134. On the problem of route blockage, there appears to be no easy solution. No one party has proposed a standard that we believe would be workable or equitable. Therefore, we can only state that our policy is to protect the future expansion of existing growth routes to the extent practicable. By this we mean that when a new route is designed, consideration should be given to adjacent routes that may have significant expansion requirements. If the new route can be reasonably adjusted to avoid or minimize impact on an established growth route, we will expect the adjustment to be made.

135. On the matter of frequency conflicts between co-pending applications, we proposed to require the later filing applicant to amend his application(s) to remove the conflict. Under the proposal, applications involving such conflicts would not be designated for hearing unless: (1) the later filed application is filed within the cutoff period prescribed by Rule Section 21.30(b), and (2) the Commission is satisfied that the frequency conflict cannot be resolved by reasonable measures by the later filing applicant.[55] Since there is no objection to this proposal, it will be adopted. To facilitate the processing of applications, the rule will contain provisions for dealing with applicants who do not make efforts to resolve conflicts within a reasonable time (see Section 21.100(e)). As proposed in the *Notice* (paragraph 56), we will accord pending applicants an opportunity to modify their applications to achieve compliance with these rules. The original filing and cut-off dates will still be determinative of priority under these rules.

3. Frequency diversity and miscellaneous technical requirements

136. We also proposed in the *Notice* (paragraphs 59-61) several measures to achieve more efficient spectrum utilization by all carriers. The most important of these relates to the use of frequency diversity.[56] We noted several possible approaches: the complete elimination of frequency diversity, reduction of the number of allowed protection channels, restriction of use to high density routes, or to

[55] In the event the applications were filed on the same day, the burden of resolving the conflict would lie equally on the applicants.

[56] Frequency diversity may be regarded as two separate transmitters operating on different frequencies but carrying the same modulation and using a single antenna system. For purposes here, it also includes the use of a spare or protection channel which may be switched into the path of a faded channel.

allow its use only where there is no reasonable alternative method of achieving the necessary reliability. Approximately 15 parties commented on this part of the proposal. Virtually all agree that frequency congestion is a problem which will grow and that space diversity is an effective means of providing reliability (at least from propagation outages). As to what should be done about frequency diversity, there are a variety of recommendations.

137. At one extreme GT&E urges virtually no change in the use of frequency diversity, contending that the presently accepted ratios (i.e. one protection channel for five working channels in the 4 GHz band, one for three in the 6 GHz band and one for one in the 11 GHz band) should be retained because they are needed for protection against equipment failures.[57] At the other extreme, Datran and Microwave Transmission Co. urge the complete elimination of frequency diversity, including the conversion of existing facilities using frequency diversity to space diversity. The other commenting parties take an intermediate approach, opposing the complete elimination of frequency diversity but suggesting various ways of restricting its use. AT&T points, as many do, to the cost advantage of frequency diversity over space diversity on multiple channel systems. It also states that protection channels in its own facilities have an important function in addition to reliability by providing channels for occasional television service and for emergency restoration of failed channels on other connecting routes. With respect to reducing the ratio of protection channels as we suggested, AT&T states that if cross

[57] Presumably Western Union can be considered of similar persuasion. It opposed consideration of frequency diversity in this proceeding, contending that the matter should be considered in connection with Docket No. 15130. In that proceeding Western Union in 1967 opposed then proposed restrictions on the use of frequency diversity.

band diversity is permitted (e.g. allowing both protection channels for the 4 and 6 GHz to be in the 6 GHz band), such an arrangement would provide adequate reliability for systems with good fading margins but would not provide adequate protection or restoration in many situations. However, AT&T believes that space diversity can be used to augment frequency diversity on paths experiencing greater fade problems, and it is making plans to so utilize space diversity.

138. Southern Pacific, United Video and Electronic Industries Association generally support restricted use of frequency diversity but take the position that the matter should be considered on a case by case basis and permitted where it is adequately justified and/or where frequency congestion is not a problem. Others, such as Nebraska Consolidated Communications, Microwave Service Company, and New York-Penn Microwave generally support a reduction in the number of protection channels. MITEQ, Inc. suggests that frequency diversity be banned on short paths of 15 to 20 miles in length. MCI emphasizes that all carriers should be treated equally and that the newer carriers should be permitted to employ the same ratio of protection channels as used by AT&T. Western Telecommunications and New York-Penn Microwave suggest a compromise between frequency diversity and space diversity in which space diversity would be utilized on the first two channels on a given route, with a protection channel being permitted upon the addition of a third working channel.

139. Upon evaluating this matter in light of the comments, we conclude that the *status quo* on the use of frequency diversity should not be maintained in view of the growing frequency congestion and the increasing demand for microwave frequencies to meet rapidly expanding communications requirements. It is generally agreed that space diversity is a satisfactory method of protecting against propagation failures. When used in conjunction with stand-

by transmitters to protect against equipment failures, it offers a reasonable alternative to frequency diversity in achieving a relatively high degree of reliability. Its principal disadvantage when standby transmitters are utilized is cost, since each channel requires two transmitters and receivers per hop. However, on a one or two channel system, the cost differential is not substantial.[58] Also, space diversity does not offer the advantage of a spare channel which can be utilized for occasional video or to meet emergency requirements. Because of these reasons we conclude that the use of frequency diversity should be restricted rather than completely eliminated. While consideration of frequency diversity on a case-by-case basis, as suggested by several parties, may in theory be an equitable and flexible approach, we reject it because this would provide no standard for system design and because of the excessive administrative burden that it would impose on the Commission. A sensible compromise would appear to be one similar to that suggested by Western Telecommunications and New York-Penn Microwave, i.e. that frequency diversity not be permitted in the 4 and 6 GHz bands for the first two working channels on a particular route. Given the greater frequency impact caused by one for one and one for two protection on "thin routes" and the availability of space diversity as a reasonable alternative, we believe such approach would yield substantial savings in spectrum usage[59] without imposing undue economic hardship on the

[58] On a one channel system both frequency diversity and space diversity (with standby transmitters) employ two transmitters and receivers per hop. On a two channel system frequency diversity (utilizing one protection channel) requires three transmitters and receivers compared with four for space diversity. The space diversity system will require some initial additional cost for an extra receiving antenna (and associated waveguide) and perhaps a somewhat higher and more rugged tower.

[59] Routes employing only one or two working channels represent a very substantial portion of the total common carrier microwave

(continued)

carrier. Under this procedure, once a route is expanded to a third working channel, a protection channel would be allowed. Because of its greater propagation problems and lesser congestion, we will not apply this standard to the 11 GHz band at this time.

140. Aside from the prohibition of frequency diversity on the first two channels on a 4 or 6 GHz route, it appears that a limitation on the total number of frequency diversity channels would be in order. Although several parties contend that the presently accepted ratios (as noted in paragraph 137) are necessary for adequate reliability, no one submits any technical data in support of this proposition. There is no doubt that additional protection channels may be desirable to the carrier as an added measure of safety or for more flexibility of operation, but we are not convinced that they are necessary as a general practice. In the past 10 years, there have been many advances in the state of art, new equipment is usually solid state and more reliable, and system design is more refined. Yet the same number of protection channels is generally used today as in the early days of microwave. Moreover, landline carriers have developed a multiplicity of routes between most of the larger communities in the country, thus creating route redundancy which gives them an extra degree of flexibility to handle peak loads or provide for restoration of failed channels. Finally, we note that frequency diversity may be supplemented by space diversity in areas where unusual propagation problems exist or where exceptional reliability is required. For these reasons,

[59] (continued)

facilities. For example, in Indiana, which is believed to be fairly typical, there are approximately 142 authorized common carrier microwave stations (exclusive of those restricted to video use) operating on some 278 transmission paths. Of these paths, about 148 consist of only one or two working channels. In view of our decision in this proceeding to permit competitive entry, it seems obvious that the number of such "thin routes" will proliferate.

we conclude that the number of protection channels can be reduced without significant consequences on the overall public interest to only one in the 4 GHz band, one in the 6 GHz band, and a one-to-three ratio in the 11 GHz band. However, for the sake of flexibility we will not require that the protection channels be in the same band as the working channels as long as the specified protection ratios are observed.[60] We recognize that there may be occasions where unusual circumstances would dictate some deviation from this policy. Therefore, we will consider requests for waivers, but we will emphasize that waivers will not be granted unless there is a substantial showing of good cause directed to the facts of a given proposal.[61]

141. The rules will apply to all new facilities proposed in the future. Because of the extensive use of frequency diversity in existing facilities and the large number of pending applications proposing such use, we will apply the new requirements to these categories as well as new facilities to be proposed in the future. Therefore, where applications (both pending and new) involve the construction of new stations or new routes, we will require that the applications be amended, as necessary, to comply with the new rules

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[60] Current use of cross band diversity is primarily limited to the 6-11 GHz bands (e.g. Western Electric's TM/TL). For purposes of this rule making such systems will be classified as 6 GHz with protection channels in the 11 GHz band.

[61] The request for waiver should (among other things) include the following information:

(1) The reasons why space diversity and/or normal allocation of protection channels are not satisfactory;

(2) The degree of frequency congestion in the area concerned;

(3) The alternatives to the use of frequency diversity and their comparative cost in reasonable detail; and

(4) Any other public interest considerations that may support the request.

(unless it can be shown that such requirement is unreasonable or disruptive in particular areas. Because of recognition of the problem inherent in the modification of existing facilities, we intend to be more flexible in application of the new rules. In general, the following procedure will be applied unless it can be shown to be unreasoanble or disruptive in particular areas. Because of the probable need to construct higher towers in many instances, we will not require existing routes of one or two working channels to be converted from frequency diversity to space diversity unless another carrier can show that the diversity frequencies are necessary for working channels. However, we will expect each carrier to make plans to reduce the number of protection channels on existing facilities to meet new requirements. In general, it would appear that before additional channels are added on an existing route, any protection channels above the specified maximum should be converted to working channels. We will require that excess protection channels be relinquished prior to the next renewal period and that statements to this effect be submitted with the applications for renewal.[62] During this conversion period we will consider applications for modification of existing facilities in a manner consistent with these objectives, taking into account the reasonableness of each carrier's conversion plans.

142. Two other technical changes that were proposed involve the use of "periscope" antennas and antennas of less than six feet in diameter. In order to promote more efficient use of the spectrum, and perhaps improve the quality of service, it was proposed to ban the use of both. Our stated purpose was to tighten transmission paths and reduce the chances for interference in areas where frequency assignments are congested. Virtually all parties commenting on

[62] The next renewal period is January 1, 1975, for AT&T Long Lines; August 1, 1975, for the Bell System Companies; and February 1, 1976, for all other carriers.

these questions support our objectives. In regard to the minimum size antenna, most suggest performance standards in lieu of the minimum six foot diameter. We think the suggestion is worthwhile. MCI proposes specific standards in tabular form which should be rather easy to apply. AT&T suggests that standards be applied with some flexibility; it contends that the standards suggested by MCI may be too lenient in some areas, such as near major metropolitan areas, and too stringent in open areas with little prospect for interference. There appears to be some merit in the argument that a requirement for use of high performance antennas at all locations would impose an unnecessary cost burden on systems located in areas not likely to be subject to congestion problems. Therefore, we have decided to adopt dual standards. One such standard, which is very similar to the MCI proposal, represents a relatively high performance antenna that would be used in areas subject to congestion. The other standard represents an adequate antenna but one which would have somewhat less stringent requirements for side and back lobe suppression. Antennas meeting the lower standard should be used only in areas where frequency congestion is not reasonably expected. The type of antenna to use in each given circumstance is a decision which will be left to the carrier.[63] However, if a carrier selects the lower performance antenna and that antenna later causes a problem to another carrier's existing or proposed facilities, which problem would not occur if the higher performance antenna had been originally installed, we will require the replacement of the lower performance at the licensee's own expense.

143. On the question of periscope antennas there is less unanimity, although the majority support an outright ban. A number of parties suggest some flexibility on the matter

[63] This is not to say that we will not challenge the use of a lower performance antenna in an obviously congested area or one in which future congestion is likely.

where there is no frequency congestion. United Video and West Texas Microwave are opposed to a total ban. They take the position that high towers (on the order of 400 feet and up) are required in flat country to get paths of acceptable length and that standard waveguide and parabolic radiators are practically limited to heights of about 250 feet. Moreover, they note that there is new periscope antenna equipment now on the market which promises good front to back isolation and reduced sidelobe radiation. We believe that these arguments for flexibility under special circumstances have some merit. Accordingly, we will ban the use of periscope antennas on new transmission paths but consider waivers where it can be shown that the periscope antenna system would involve substantially less cost and that the impact of its use is likely to be minimal.[64]

144. As to existing facilities employing periscope antennas or antennas not meeting the new performance standards, we will not require their replacement, except where it can be shown that such facilities inhibit the efficient use of the spectrum. In such cases, replacement will be required at the licensee's expense. These new requirements will, of course, be applied to all pending applications proposing new frequency paths.

[64] Requests for waivers should specify cost comparisons in reasonable detail and identify all existing and proposed terrestrial and satellite facilities on which the proposal could conceivably have some impact. Where sophistication of design is a factor in minimizing possible impact, full technical particulars should be submitted.

D. Issue D: Whether some measure of protection to applicants' subscribers is called for in the area of quality and reliability of service.

1. Proposals in the Notice

145. In the *Notice* (paragraphs 62-65), the Commission tentatively decided against prescribing minimum standards of technical performance, but proposed to require for *all* carriers providing private line or other specialized services (paragraph 63):

(1) that the applicant specify in standard terminology in his microwave application the proposed reliability of service to the customer, to the extent that the nature of the proposed service is known;

(2) that the carrier be required to specify in his tariff, and notify the customer of, the precise reliability factors applicable to the particular service;

(3) that the carrier make refunds on a reasonable proportionate basis where the service rendered fails to meet the specified reliability standards; and

(4) that the carrier make periodic reports to the Commission concerning the reliability actually achieved, service complaints and refunds.

The Commission also requested comments on the development of standard statements of reliability quality factors for the various types of service, and on the contents of the proposed quarterly reports (paragraph 65).

2. Position of the Parties

146. All parties who addressed this issue (carriers applicants, and others) were in favor of the goal of the proposals as a matter of general principle, though some questions were raised as to details. For example, Western Union asserted that it might be hard for those new carriers not providing end-to-end service to comply, since it might be difficult to determine who was responsible for any failure. Southern Pacific and Western TeleCommunications were concerned that quarterly reports might prove burdensome. As an alternative, Southern Pacific suggested periodic filing of statistical reports on reliability to enable the Commission to determine whether more detailed reports would be necessary. Western TeleCommunications suggested semi-annual reports, but would prefer an in-system quality control program with monitoring. GT&E suggested utilization of a sampling procedure for reporting trouble reports; and questioned whether the same measurement factors should be applied to all private line services of all carriers on an individual line basis.

147. However, very few parties addressed this issue in any depth, and there appears to be no consensus among those who did, except for a suggestion that the matter needs further study. AT&T's comments (pages 112-115) describe its methods for defining performance or quality objectives for its services and the problems it sees, make suggestions as to how to state service quality in terms more appropriate to meet FCC objectives, and incorporate by reference its comments in Docket No. 15130 (filed December 21, 1967). While agreeing that customers should be provided with understandable statements, AT&T urges that specifications in tariffs should be limited to basic definitions of the concept and scope of quality and reliability and customer refund provisions. AT&T states that it is prepared to work with the Commission in defining standard statements of

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I. BACKGROUND

1. The *Notice of Inquiry to Formulate Policy, Notice of Proposed Rule Making, and Order* in this proceeding (24 FCC 2d 318, released July 17, 1970) was occasioned by a large number of applications by Data Transmission Corporation (Datran), companies associated with Microwave Communications of America, Inc. (MCI carriers or MCI), and others for authorizations to construct microwave facilities to provide specialized common carrier services in various parts of the country.[1] Datran has proposed a switched, all digital network dedicated exclusively to data transmission. The MCI carriers and others all propose point-to-point facilities for private line services including, but not limited, to data transmission. The applications are opposed by established carriers and other related interests, principally by American Telephone and Telegraph Company (AT&T) and The Western Union Telegraph Company (Western Union).[2]

A. Purpose of this Proceeding

2. The *Notice* undertook to resolve in an overall policy and rule making proceeding certain basic policy and procedural questions (see paragraph 17 below) which appeared common to all of the applications and oppositions, prior to consideration of each proposal on its individual merits (*Notice*, paragraphs 3, 23-24). The Commission stated that such action would be conducive to prompt, orderly and efficient disposition of these matters and, in our opinion, would be far preferable to decisions on them

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[1] At the time of the *Notice*, there were 1713 pending applications for microwave stations. As of March 15, 1971, there are now 33 applicants (of whom 17 are MCI affiliated), making 46 separate proposals and seeking a total of 1877 microwave stations (see Appendix A hereto).

[2] The *Notice* provided for a moratorium of the filing of petitions to deny and other pleadings involving specialized carrier applications pending a further Commission order following consideration of the issues in this proceeding (*Notice*, paragraphs 72, 75).

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E. Issue E: What is the appropriate means for local distribution of the proposed services?

1. Proposals in the Notice

151. In the *Notice*, it was proposed that new entrants and their customers would have the following options with respect to local loop service (*Notice*, paragraphs 67, 69):

(1) Interconnection or leased channel arrangements with local telephone carriers under reasonable terms and conditions to be negotiated with the new carriers (or in the case of customers, under reasonable terms set forth in the tariff schedule of the local carrier).

(2) Construction of independent local facilities by the applicants, their customers or some other entity. Comments were requested on the use of wire, cable and/or radio, particularly frequencies in the vicinity of 11 GHz, and 18 and 50 GHz or some other portion of the spectrum above 11 GHz.

Parties were requested to address this aspect fully, with particular attention to the technical feasibility and comparative costs of the various alternatives and the effect on charges to subscribers for end-to-end service (*Notice*, paragraph 70).

2. Positions of the Parties

(a) Interconnection

152. While Datran insists that end-to-end facilities are essential to its proposal, most of the applicants claim that a flexibility of choice as to interconnection or construction of

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new independent facilities is needed, and some propose to rely solely on interconnection. AT&T says that: "When the Commission determines that it is in the public interest to license additional intercity common carriers, we would be willing to discuss with them the technical arrangements required and appropriate charges for any connections required of the telephone companies." GT&E states that, with adequate lead time, it will provide local distribution services to any authorized carrier. MCI claims to be encouraged by the statements of AT&T and GT&E on this score. Western Union urges the Commission not to prejudge the technical and economic feasibility of interconnection in this proceeding, and to hold individual evidentiary hearings on interconnection for each new system. USITA asserts that separate local facilities would cause a loss of revenues to the independent telephone companies, but sees legal and technical problems in requiring interconnection and seeks individual evidentiary hearings. Southern Pacific urges the Commission not to postpone this question for future uncertainty and perhaps dispute, but rather to set forth guidelines now.

(b) Construction of independent local facilities

153. Datran states that end-to-end facilities are essential to its switched digital data network and that interconnection with the local telephone exchange systems is not suitable to it. For local loops, it proposes to use a combination of cable and 11 GHz frequencies (with low power transmitters and all carrier frequencies closely spaced with a single 20 MHz bandwidth which could distribute up to 4,000 4.8Kb/s two-way data channels). Datran claims, with supporting technical studies for Dallas and Los Angeles, that such intra-city use of 11 GHz would be fully compatible with intercity use, at least initially, and that 18 and 30 GHz and optical systems may be feasible alternatives for

future expansion (particularly for short links). While preferring 11 GHz, Datran suggests a mix of 11 and 18 GHz as an alternative or, as a third choice, the use of 18 GHz.

154. MCI has filed a petition for rule making (RM 1700) to allocate the frequencies 38.6-40 GHz for a local Carrier Distribution Service. This petition is described in the summary of its comments (Appendix C, page 7). It urges that the local distribution issue be deferred, and that its petition be considered in a separate proceeding. MCI's petition is opposed by GT&E (which is against any independent local facilities), and supported by Martin Marietta Corp., Resalab, Inc., MITEQ, Inc., AT&T and Western Union. Datran expresses doubts as to the technical feasibility of 38.6-40 GHz for this purpose under the present state-of-the-art.

155. While AT&T supports the end-to-end concept, it prefers 38.6-40 GHz over the use of either 11 GHz or 18 GHz (which it claims should be reserved primarily for inter-city use and access to metropolitan areas) and suggests consideration of the possible use of 30 and 50 GHz frequencies as well. AT&T supports further proceedings because the applicants have not given sufficient attention to this aspect and it foresees some technical and economic problems in such proposals as they have made. While adhering to the view that evidentiary hearings are required on all aspects of this proceeding, Western Union concurs in AT&T's position that 11 GHz should be reserved for inter-city use and believes that the possible use of frequencies above 17 GHz should be considered in a separate proceeding.

156. EIA asserts that the use of 11 GHz for local loops would eventually create problems for inter-city systems entering congested areas, but until such time as the 18-50 GHz region and equipment are available, sees no reason why 11 GHz should not be utilized to initiate metropolitan

distribution systems so long as they are coordinated with access systems. NCTA requests the Commission not to decide upon any local distribution means which would exclude eventual use of CATV cable. Southern Pacific, like most of the applicants, states that the new carriers should have flexibility of choice of means, including interconnection, and that with such flexibility local distribution will be accomplished somehow. It sees problems in the promiscuous use of 11 GHz and suggests that the use of 18-50 GHz may be premature. However, Southern Pacific urges the Commission not to postpone the local distribution question, including interconnection terms, for future uncertainty and perhaps dispute. It requests the Commission to set forth guidelines and preliminary outlines of local distribution characteristics at this time for further study and comment.

3. Conclusions

157. We reaffirm the view expressed in the *Notice* (paragraph 67) that established carriers with exchange facilities should, upon request, permit interconnection or leased channel arrangements on reasonable terms and conditions to be negotiated with the new carriers, and also afford their customers the option of obtaining local distribution service under reasonable terms set forth in the tariff schedules of the local carrier. Moreover, as there stated, "where a carrier has monopoly control over essential facilities we will not condone any policy or practice whereby such carrier would discriminate in favor of an affiliated carrier or show favoritism among competitors."[65] In view of the representations of AT&T and GT&E in this

[65] See, e.g., *Report and Order in Docket No. 16778*, 12 FCC 2d 841, 846 (1968); *Final Report and Order in Docket No. 18509*, 21 FCC 2d 307, 324-325 (1970); *The Western Union Telegraph Co. v. United States*, 217 F.2d 579 (C.A. 2, 1954).

problem arise, we will act expeditiously to take such measures as are necessary and appropriate in the public interest to implement and enforce the policies and objectives of this Decision.

proceeding, upon which we rely, and the self-interest of other independent telephone companies in not losing potential new business, there appears to be no need to say more on this question at this time. Should any future

158. We also conclude that new carriers should have the option of constructing their own independent local facilities to provide end-to-end service.[66] However, this record does not afford an adequate basis for any determination as to what radio frequencies should be made available for use in this conjunction. An allocation of frequencies above 11 GHz might be inappropriate prior to the World Administrative Radio Conference for Space Telecommunications (Geneva, June-July, 1971). Moreover, the parties to this proceeding are those primarily interested in Issues A and B, and other entities who may have an interest in frequency allocations above 11 GHz have not participated. We recognize that Datran has discussed and supported its 11 GHz proposal at some length, and other parties have addressed this question, though not in any depth. Since Datran has not yet applied for any 11 GHz intra-city facilities, there would appear to be time to conduct further proceedings before any decision on the use of such frequencies is necessary.

159. Accordingly, we have decided to issue a further notice of proposed rule making on MCI's proposal to allocate the frequencies 38.6-40 GHz for a local carrier distribution service, and to include comparative con-

[66] By this we do not mean to preclude the use of CATV systems, if satisfactory arrangements can be worked out between the CATV operator and the specialized carrier, and subject to any regulation required by Title II of the Communications Act and/or Commission rules.

sideration of frequencies in the other regions of the spectrum that have been suggested (11 GHz, 18 GHz, 30 GHz and 50 GHz). We do not foreclose the contention, made by some parties here, that more than one frequency allocation might be appropriate, at least temporarily, or counterproposals as to possible alternative allocations. We will issue the further notice as soon as possible, and expedite the further proceedings on this question. For, we realize that this aspect should be resolved at an early date so that those authorized entrants contemplating local construction can plan and build such facilities without delay to the inauguration of the system.

III. MISCELLANEOUS

160. In light of the foregoing, we conclude that the public interest, convenience and necessity would be served by adoption of the policies set forth above and the rules contained in Appendix E hereto, effective July 15, 1971. Authority for the policies and rules adopted herein is contained in Sections 1, 2 (a), 4 (i) and (j), 201, 202, 214, 218, 301, 303, 307-309, and 403 of the Communications Act. We also conclude that further proceedings are necessary for a resolution of Issues D and E herein, and will retain full jurisdiction over those aspects of this proceeding.

161. Our Order released on July 17, 1970 herein (24 FCC 2d 318, 350) extended the time for filing petitions to deny and other pleadings with respect to then pending and new applications by specialized carriers, which pleadings were not due as of July 17, 1970, to a date to be specified by further order. We will provide that such pleadings are due about 30 days after publication of this *First Report and Order* in the Federal Register, i.e., on July 15, 1971. Thereafter, the normal filing times specified in the Commission's rules will apply to any responsive or new pleadings. Such pleadings should address questions not disposed of in this proceeding.

IV. ORDER

162. Accordingly, IT IS ORDERED, That:

a. The policies set forth herein and the rules contained in Appendix E hereto ARE ADOPTED, effective July 15, 1971.

b. Petitions to deny and other pleadings with respect to the applications listed in Appendix A hereto, which were not due as of July 17, 1970, SHALL BE FILED on or before July 15, 1971.

c. This proceeding IS TERMINATED only with respect to Issues A, B, and C, and the Commission retains full jurisdiction over Issues D and E.

FEDERAL COMMUNICATIONS COMMISSION*

/s/ Ben F. Waple
BEN F. WAPLE
Secretary

Attachments

NOTE: Rules changes herein will be covered by T.S. VII(70)-1.

* See attached statement of Commissioner Robert E. Lee.

CONCURRING STATEMENT OF COMMISSIONER ROBERT E. LEE

The Commission, today, issued a First Report and Order in the specialized common carrier proceeding (Docket No. 18920) which would affirm a policy favoring competition in the field of specialized services and establish guidelines and procedures for implementation of that policy.

The First Report and Order states that in all cases the Commission must find an applicant's proposal to be in the public interest, that future applications will be examined in light of the circumstances then shown — including any experience to date with operations of the pending applicants, and that the Commission will take such action as is necessary in the public interest.

As of March 15, 1971, there were one thousand eight hundred and seventy-seven (1877) applications filed with the Commission which will require processing as a result of our action today. In the interest of orderly procedure and in order to gain experience from our policy with respect to the pending applications, I would have preferred if the Commission decided to impose a three (3) year moratorium on the filing of new applications by specialized carriers for inter-city facilities, except for extraordinary cause shown. This would avoid a flood of new filings and permit the Commission a reasonable opportunity to examine, based on experience, whether the public interest was served by permitting new entry in the specialized communications field in various parts of the United States.

APPENDIX D

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 71-1002
66937

In the Matter of	)	
	)	
Establishment of Policies and	)	
Procedures for Consideration of	)	
Applications to Provide Specialized	)	**Docket No. 18920**
Common Carrier Services in the	)	
Domestic Public Point-to-Point	)	
Microwave Radio Service and Pro-	)	
posed Amendments to Parts 21, 43	)	
and 61 of the Commission's	)	
Rules.	)	

MEMORANDUM OPINION AND ORDER

Adopted: September 29, 1971 ; Released: October 6, 1971

By the Commission: Commissioner Bartley absent; Commissioner Johnson concurring in the result.

1. The Commission has before it a "Petition for Reconsideration," filed on June 29, 1971 by the National Association of Regulatory Utility Commissioners (NARUC) and the Utilities and Transportation Commission of the State of Washington (UTCW); and responsive pleadings addressed to that petition, in whole or in part, by Data Transmission Company (Datran), Interdata Communications, Inc. (Interdata), Nebraska Consolidated Communications Corporation (Nebraska Consolidated),

the MCI Carriers (MCI), and Southern Pacific Communications Company (Southern Pacific).[1]

2. Petitioners NARUC and UTCW seek reconsideration and reversal of the *First Report and Order* in this proceeding (29 FCC 2d 870), pursuant to Section 405 of the Communications Act and Section 1.106 of the Commission's rules, on the grounds that such *First Report and Order:* (1) violates the public interest standard of the Act by establishing a general policy permitting the entry of new carriers in the specialized communications field with no showing that existing carriers are providing inadequate service; and (2) dispenses with comparative hearings on the various claims of economic mutual exclusivity among the applicants which are required by the Act under the circumstances. Respondents contend that the petition, for the most part, merely renews arguments which were fully considered in the *First Report,* and does not show anything to warrant modification or reversal of the policy conclusions there reached.[2]

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[1] This Memorandum Opinion and Order is concerned only with the petition of NARUC and UTCW, and related pleadings. The petitions for partial reconsideration filed by American Telephone and Telegraph Company and GTE Service Corporation, and comments of other parties addressed to those petitions, will be treated separately by subsequent order, since they go solely to the technical standards and rules set forth in paragraphs 123-144 and Appendix E of the *First Report and Order* — matters not challenged by NARUC and UTCW.

[2] In addition, Datran claims that the petition is procedurally defective under Section 1.106 (b) of the Commission's rules insofar as UTCW is concerned, for failure to state with particularity the manner in which UTCW is aggrieved or its interest adversely affected by the action taken, and for failure to show good reason why it was not possible for UTCW to participate in the earlier stages of the proceeding. We find that the petition does not meet the requirements of Section 1.106 (b) in this respect. In any event, since the petition does not indicate that UTCW is raising any argument different from those of NARUC, our ruling on the merits would be the same for UTCW as it is for NARUC.

3. Except as indicated below, we are of the opinion that the arguments in the petition are essentially repetitive of contentions previously advanced by NARUC and others, which are sufficiently treated in the *First Report*. See, particularly, paragraphs 23-122 and Section II of Appendix C of the *First Report*, 29 FCC 2d at 887-927, 958-966. We have nothing to add to our discussion of those aspects in the *First Report*.

4. We will, however, address briefly the assertion of NARUC that the entry of new carriers in the interstate market for specialized communication services will impact adversely on the customers of the existing telephone companies for local telephone exchange service. In essence, NARUC argues that such entry will divert revenues from the existing carriers and that this alleged loss of revenues will result in higher rates and revenue requirements for local services which are already confronted with telephone company requests for higher intrastate rates in many states. However, NARUC offers no factual or other record support for these bald assumptions. Nor does the NARUC challenge any of the detailed findings made by the Commission on the basis of the extensive record herein that such new entry will have no significant adverse impact on the rates or revenue requirements applicable to the essential services of the existing carriers. Specifically, the Commission found that there is substantial evidence of a rapidly growing market for new and diversified communication services to meet the changing and expanding communications requirements of the public; and that the public interest in efficient and economical communications would best be served by authorizing additional carriers to compete with the existing carriers in serving that market. In reaching this conclusion, the Commission considered the technical and other limitations presently existing in the plant, operations and other capabilities of the existing carriers. The Commission also concluded that any potential

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adverse effects of such new entry on the existing carriers and their customers would be minimal, if any at all. In this connection, the Commission found that the revenues of the Bell System from the specialized communications services constituted a relatively small percentage of the total communications market now being served or expected to be served by the Bell System; that the Bell System is likely to obtain a very substantial share of the new market; and that any adverse effects on Western Union are not expected to be of sufficient magnitude to justify depriving the public of the benefits that the Commission warrants may reasonably be anticipated by permitting new entry into the specialized communications field. See also, 29 FCC 2d at 910-917. Accordingly, there is no valid basis for NARUC's assumption that such entry will prejudice the users of local telephone services.

5. Apparently, as an extension of its unsubstantiated claim that new entry will siphon off revenues and earnings from the telephone companies to the detriment of exchange service users, NARUC makes the somewhat novel, but legally dubious, claim that the Commission should pursue a policy of generating excess interstate earnings which should be applied to subsidize the revenue requirements applicable to local exchange services subject to state regulatory jurisdiction. It states that "the only means of affording relief [from higher charges] to local users, under existing technology and this age of inflation, is to generate excess earnings in interstate operations and to 'flow through' these earnings for the benefit of local users by allocating more of the cost of our national communications system to interstate operations and thereby affording relief in local operations."

6. The Commission fully appreciates the objective of the NARUC to minimize the rates and revenue requirements of the telephone companies applicable to intrastate local ser-

vices. We do not believe, however, that either as a matter of law or practice, this can be accomplished by arbitrarily inflating the cost of service subject to Federal jurisdiction and deflating by like amount the costs applicable to services subject to state jurisdiction. The allocation of joint costs incurred in furnishing telephone services subject to both Federal and state jurisdiction is, of course, a complex and at times controversial matter. Nevertheless, it is incumbent upon Federal and state rate-making authorities, as a matter of law to employ allocation procedures which will fairly and reasonably reflect the legitimate costs of each service. See *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133 (1930); *Minnesota Rate Cases*, 230 U.S. 352 (1913). Allocations cannot and should not be designed to artificially shift any part of the revenue requirement applicable to one jurisdiction into another. This, clearly, would lead to confusion, if not chaos, in maintaining a system of dual Federal/State regulation on a rational and manageable basis. As the NARUC is well aware, procedures and mechanisms are available and have been employed over the years on a cooperative Federal/State basis as a means of establishing and maintaining fair and equitable jurisdictional allocations. This proceeding is not the appropriate forum to address that subject.

7. In sum, we are not persuaded that the arguments in the instant petition for reconsideration call for modification or reversal of the policy determinations reached in the *First Report* on Issues A and B (29 FCC 2d at 880-927), which we hereby reaffirm.

8. Accordingly, IT IS ORDERED, That the "Petition for Reconsideration" filed on June 29, 1971 by the National Association of Regulatory Utilities Commissioners and the Utilities Transportation Commission of the State of Washington IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Ben F. Waple
BEN F. WAPLE
Secretary

APPENDIX E

COMMUNICATIONS ACT OF 1934
AS AMENDED
47 U.S.C. §§151 *et. seq.* (1970)

SUBCHAPTER I. — GENERAL PROVISIONS

§ 151. Purposes of chapter; Federal Communications Commission created.

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter. (June 19, 1934, ch. 652, § 1, 48 Stat. 1064; May 20, 1937, ch. 229, § 1, 50 Stat. 189.)

SUBCHAPTER II. — COMMON CARRIERS

§ 214. Extension of lines; certificate of public convenience and necessity; discontinuance of service.

(a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in

transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided*, That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 or 222 of this title: *Provided further*, That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however*, That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

(b) Upon receipt of an application for any such certificate, the Commission shall cause notice thereof to be given to, and shall cause a copy of such application to be filed with, the Secretary of the Army, the Secretary of the Navy, and the Governor of each State in which such line is proposed to be constructed, extended, acquired, or operated, or in which such discontinuance, reduction, or impairment of service is proposed, with the right to those notified to be heard; and the Commission may require such published notice as it shall determine.

(c) The Commission shall have the power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.

(d) The Commission may, after full opportunity for hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier, party to such proceeding, to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier and to extend

its line or to establish a public office; but no such authorization or order shall be made unless the Commission finds, as to such provision of facilities, as to such establishment of public offices, or as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier which refuses or neglects to comply with any order of the Commission made in pursuance of this subsection shall forfeit to the United States $100 for each day during which such refusal or neglect continues. (June 19, 1934, ch. 652, § 214, 48 Stat. 1075; Mar. 6, 1943, ch. 10, §§ 2-5, 57 Stat. 11.)

SUBCHAPTER III.—SPECIAL PROVISIONS RELATING TO RADIO

Part I.—GENERAL PROVISIONS

§ 301. License for radio communication or transmission of energy.

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such licenses shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the

United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter. (June 19, 1934, ch. 652, §301, 48 Stat. 1081.)

§ 307. Licenses; allocation of facilities; terms; renewals.

(a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

(c) Omitted.

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted

may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses, and not to exceed five years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby. In order to expedite action on applications for renewal of broadcasting station licenses and in order to avoid needless expense to applicants for such renewals, the Commission shall not require any such applicant to file any information which previously has been furnished to the Commission or which is directly material to the considerations that affect the granting or denial of such application, but the Commission may require any new or additional facts it deems necessary to make its findings. Pending any hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405 of this title, the Commission shall continue such license in effect. Consistently with the foregoing provisions of this subsection, the commission may by rule prescribe the period or periods for which licenses shall be granted and renewed for particular classes of stations, but the commission may not adopt or follow any rule which would preclude it, in any case involving a station of a particular class, from granting or renewing a license for a shorter period than that prescribed for stations of such class if, in its judgment, public interest, convenience, or necessity would be served by such action.

(e) No renewal of an existing station license in the broadcast or the common carrier services shall be granted more than thirty days prior to the expiration of the original license. (June 19, 1934, ch. 652, § 307, 48 Stat. 1083; June 5, 1936, ch. 511, § 2, 49 Stat. 1475; July 16, 1952, ch. 879, § 5, 66 Stat. 714; Sept. 13, 1960, Pub. L. 86-752, § 3, 74 Stat. 889; Apr. 27, 1962, Pub. L. 87-439, 76 Stat. 58.)

§ 308. Same; application; conditions and restrictions in license for foreign communication.

(a) The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it: *Provided*, That (1) in cases of emergency found by the Commission involving danger to life or property or due to damage to equipment, or (2) during a national emergency proclaimed by the President or declared by the Congress and during the continuance of any war in which the United States is engaged and when such action is necessary for the national defense or security or otherwise in furtherance of the war effort, or (3) in cases of emergency where the Commission finds, in the non-broadcast services, that it would not be feasible to secure renewal applications from existing licenses or otherwise to follow normal licensing procedure, the Commission may grant construction permits and station licenses, or modifications or renewals thereof, during the emergency so found by the Commission or during the continuance of any such national emergency or war, in such manner and upon such terms and conditions as the Commission shall by regulation prescribe, and without the filing of a formal application, but no authorization so granted shall continue in effect beyond the period of the emergency or war requiring it: *Provided further*, That the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

(b) All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies

and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee.

(c) The Commission in granting any license for a station intended or used for commercial communication between the United States or any Territory or possession, continental or insular, subject to the jurisdiction of the United States, and any foreign country, may impose any terms, conditions, or restrictions authorized to be imposed with respect to submarine-cable licenses by section 35 of this title. (June 19, 1934, ch. 652, § 308, 48 Stat. 1084; July 16, 1952, ch. 879, § 6, 66 Stat. 714; Apr. 27, 1962. Pub. L.87-444, § 3, 76 Stat. 63.)

§ 309. Application for license.

(a) Considerations in granting application.

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

(b) Time of granting application.

Except as provided in subsection (c) of this section, no such application —

(1) for an instrument of authorization in the case of a station in the broadcasting or common carrier, services, or

(2) for an instrument of authorization in the case of a station in any of the following categories:

(A) fixed point-to-point microwave stations (exclusive of control and relay stations used as integral parts of mobile radio systems),

(B) industrial radio positioning stations for which frequencies are assigned on an exclusive basis,

(C) aeronautical en route stations,

(D) aeronautical advisory stations,

(E) airdrome control stations,

(F) aeronautical fixed stations, and

(G) such other stations or classes of stations, not in the broadcasting or common carrier services, as the Commission shall by rule prescribe,

shall be granted by the Commission earlier than thirty days following issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof.

(c) Applications not affected by subsection (b).

Subsection (b) of this section shall not apply—

(1) to any minor amendment of an application to which such subsection is applicable, or

(2) to any application for —

(A) A minor change in the facilities of an authorized station,

(B) consent to an involuntary assignment or transfer under section 310(b) of this title or to an assignment or transfer thereunder which does not involve a substantial change in ownership or control,

(C) a license under section 319(c) of this title or, pending application for or grant of such license, any special or temporary authorization to permit interim operation to facilitate completion of authorized con-

struction or to provide substantially the same service as would be authorized by such license,

(D) extension of time to complete construction of authorized facilities,

(E) an authorization of facilities for remote pickups, studio links and similar facilities for use in the operation of a broadcast station,

(F) authorizations pursuant to section 325(b) of this title where the programs to be transmitted are special events not of a continuing nature,

(G) a special temporary authorization for non-broadcast operation not to exceed thirty days where no application for regular operation is contemplated to be filed or not to exceed sixty days pending the filing of an application for such regular operation, or

(H) an authorization under any of the proviso clauses of section 308(a) of this title.

(d) Petition to deny application; time; contests; reply; findings.

(1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima

facie inconsistent with subsection (a) of this section. Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a) of this section, it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a) of this section, it shall proceed as provided in subsection (e) of this section.

(e) Hearings; intervention; evidence; burden of proof.

If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more

than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

(f) Temporary authorization of emergency operations under subsection (b).

When an application subject to subsection (b) of this section has been filed, the Commission, notwithstanding the requirements of such subsection, may, if the grant of such application is otherwise authorized by law and if it finds that there are extraordinary circumstances requiring emergency operations in the public interest and that delay in the institution of such emergency operations would seriously prejudice the public interest, grant a temporary authorization, accompanied by a statement of its reasons therefor, to permit such emergency operations for a period not exceeding ninety days, and upon making like findings may extend such temporary authorization for one additional period not to exceed ninety days. When any such grant of a temporary authorization is made, the Commission shall give expeditious treatment to any timely filed petition to deny such application and to any petition for rehearing of such grant filed under section 405 of this title.

(g) Classification of applications.

The Commission is authorized to adopt reasonable classifications of applications and amendments in order to effectuate the purposes of this section.

(h) Form and conditions of station licenses.

Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license

shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject: (1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein; (2) neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this chapter; (3) every license issued under this chapter shall be subject in terms to the right of use or control conferred by section 606 of this title. (June 19, 1934, ch. 652, § 309, 48 Stat. 1085; July 16, 1952, ch. 879, § 7, 66 Stat. 715; Mar. 26, 1954, ch. 110, 68 Stat. 35; Jan. 20, 1956, ch. 1, 70 Stat. 3; Sept. 13, 1960, Pub. L. 86-752, § 4(a), 74 Stat. 889; May 14, 1964, Pub. L. 88-306, 78 Stat. 193; May 14, 1964, Pub. L. 88-307, 78 Stat. 194.)

§310. Alien ownership as barring station license; assignment and transfer of construction permit or station license; authorizations permitted in cases of bilateral international agreements.

(a) The station license required shall not be granted to or held by—

(1) Any alien or the representative of any alien;

(2) Any foreign government or the representative thereof;

(3) Any corporation organized under the laws of any foreign government;

(4) Any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country;

(5) Any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more

than one-fourth of the capital stock is owned of record or voted, after June 1, 1935, by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or the revocation of such license.

Nothing in this subsection shall prevent the licensing of radio apparatus on board any vessel, aircraft, or other mobile station of the United States when the installation and use of such apparatus is required by Act of Congress or any treaty to which the United States is a party.

Notwithstanding paragraph (1) of this subsection, a license for a radio station on an aircraft may be granted to and held by a person who is an alien or a representative of an alien if such person holds a United States pilot certificate or a foreign aircraft pilot certificate which is valid in the United States on the basis of reciprocal agreements entered into with foreign governments.

Notwithstanding section 301 of this title and paragraphs (1) and (2) of this subsection, the Commission may issue authorizations, under such conditions and terms as it may prescribe, to permit an alien licensed by his government as an amateur radio operator to operate his amateur radio station licensed by this government in the United States, its possessions, and the Commonwealth of Puerto Rico provided there is in effect a bilateral agreement between the United States and the alien's government for such operation on a reciprocal basis by United States amateur radio operators: *Provided,* That when an application for an authorization is received by the Commission, it shall notify the appropriate agencies of the Government of such fact, and such agencies shall forthwith furnish to the Commission such information in their possession as bears upon the compatibility of the request with the national security: *And provided further,* That the requested au-

thorization may then be granted unless the Commission shall determine that information received from such agencies necessitates denial of the request. Other provisions of this chapter and of the Administrative Procedure Act shall not be applicable to any request or application for or modification, suspension, or cancellation of any such authorization.

(b) No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee. (June 19, 1934, ch. 652, § 310, 48 Stat. 1086; July 16, 1952, ch. 879, § 8, 66 Stat. 716; Aug. 28, 1958, Pub. L. 85-817, § 2, 72 Stat. 981; May 28, 1964, Pub. L. 88-313, § 2, 78 Stat. 202.)

APPENDIX F

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969
42 U.S.C. §§ 4321 *et. seq.* (1970)

§ 4321. Congressional declaration of purpose.

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality. (Pub. L. 91-190, § 2, Jan. 1, 1970, 83 Stat. 852.)

SUBCHAPTER I.—POLICIES AND GOALS

§ 4331. Congressional declaration of national environmental policy.

(a) The Congresss, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practical means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the

social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs and resources to the end that the Nation may —

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment. (Pub. L. 91-190, title I, § 101, Jan. 1, 1970, 83 Stat. 852.)

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts.

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws

of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies,

which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by subchapter II of this chapter.

(Pub. L. 91-190, title I, § 102, Jan. 1, 1970, 83 Stat. 853.)

§ 4333. Conformity of administrative procedures to national environmental policy.

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter and shall propose to the President not later than July 1, 1971, such measures as may

be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this chapter. (Pub. L. 91-190, title I, § 103, Jan. 1, 1970, 83 Stat. 854.)

§ 4334. Other statutory obligations of agencies.

Nothing in section 4332 or 4333 of this title shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency. (Pub. L. 91-190, title I, § 104, Jan. 1, 1970, 83 Stat. 854.)

§ 4335. Efforts supplemental to existing authorizations.

The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies. (Pub. L. 91-190, title I, § 105, Jan. 1, 1970, 83 Stat. 854.)

APPENDIX G

ADMINISTRATIVE PROCEDURE ACT
5 U.S.C. §§551 *et seq.* (1970)

CHAPTER 7. — JUDICIAL REVIEW

§706. Scope of review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. (Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WASHINGTON UTILITIES & TRANSPORTATION COMMISSION, *Petitioner,* v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents,* DATA TRANSMISSION CO.; NATIONAL RETAIL MERCHANTS ASSOCIATION; THE BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION; MCI CARRIERS; NEBRASKA CONSOLIDATED COMMUNICATIONS; INTERDATA COMMUNICATIONS; SOUTHERN PACIFIC COMMUNICATIONS COMPANY; WESTERN TELE-COMMUNICATIONS, *Intervenors.*	No. 71-2919
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, *Petitioner,* v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents.*	No. 72-1198 PETITION FOR REHEARING

To the Honorable United States Court of Appeals for the Ninth Circuit and the Judges Thereof:

The National Association of Regulatory Utility Commissioners (NARUC), a petitioner in the above-entitled cause, presents this, its petition for a rehearing of the above-entitled cause, and in support thereof, respectfully shows:

I.

The petition is respectfully addressed to two specific portions of the opinion herein which go to the heart of the Court's decision to affirm the order of the Federal Communications Commission (FCC) in this case.

First, although recognizing that the FCC has a legal duty to consider the effects of its orders on local telephone rates and service (Slip Op., p. 13), the Court nevertheless held that the FCC's treatment of this issue in the decision below is adequate. (Slip Op., pp. 24-25). In so holding, the Court was apparently either unaware, or did not fully appreciate the significance, of subsequent FCC decisions to hold a detailed investigation, *inter alia*, of the economic impact of the decision below on local telephone service.

The NARUC respectfully submits that the decision to hold the economic impact investigation, as well as the nature thereof, is fundamentally inconsistent with the FCC's stated rationale below and its posture before this Court in defending the decision herein under review. Accordingly, the FCC's own actions have vitiated the legal basis for affirming the FCC's finding of public interest, convenience, and necessity on this record, and the cause must therefore be remanded for further proceedings.

Second, exercising its judicial discretion, the Court balanced the competing interests as to whether the FCC's failure to comply with the National Environmental Policy Act of 1969 (NEPA)[1] should be reviewed, and concluded

[1] Public Law 91-190, 83 Stat. 852 (1970), 42 U.S.C., Sec. 4321, *et seq.*.

that "in the particular circumstances of this case the balance should be struck against possible review and reversal" of the FCC's order. (Slip Op., pp. 37-40). In so holding, the Court apparently misapprehended the factual context of this case, in that, contrary to the conclusions of the Court:

(1) No other opportunity exists for raising NEPA claims with respect to the authorization of specialized common carriers to provide service. Thus, if this Court does not review the NEPA issues, the FCC will be permitted to entirely escape compliance with NEPA in one of the few general proceedings it has conducted which is likely to have a significant impact on the quality of the human environment.

(2) It does not necessarily follow, if specialized carriers are not permitted to build and operate the microwave towers at issue, that existing carriers would build and operate them. Thus, there is no valid basis herein for concluding that the "incremental adverse effect [on the quality of the human environment] that might result from the substitution of competition for monopoly" is insubstantial.

(3) No potential for abuse would exist if this Court were to review the NEPA claims in this case.

(4) Any delay, waste or expense which might result from remand at this stage is not a valid equitable consideration in declining to grant review in this case.

Moreover, in so holding the Court was apparently unaware, or did not fully appreciate the significance, of subsequent rules adopted by the FCC to implement NEPA. The NARUC respectfully submits that these rules provide definitive guidance, which the Court previously felt was lacking, for disposing of the NEPA claims sought to be raised herein.

Considered in concert, therefore, the NARUC respectfully submits that the foregoing factors demonstrate that

the balance struck by the Court is in error, and that, accordingly, its judgment should be reversed and the cause remanded to the FCC for compliance with NEPA.

II.

At the outset, the NARUC respectfully renews its request that the Court take judicial notice of the following FCC opinions and orders:[2]

In the Matter of Economic Implications and Interrelationships Arising From Policies and Practices Relating to Customer Interconnection, Jurisdictional Separations and Rate-Structures, Docket No. 20003:

a) Notice of Inquiry, adopted April 9, 1974, and released April 10, 1974, FCC 74-344, 46 FCC 2d 214;

b) Memorandum Opinion and Order, adopted December 5, 1974, and released December 17, 1974, FCC 74-1345, 49 FCC 2d _____; and

c) First Supplemental Notice, adopted December 5, 1974, and released December 17, 1974, FCC 74-1346, 50 FCC 2d _____; and

In the Matter of Implementation of the National Environmental Policy Act of 1969, Docket No. 19555, Report and Order, adopted September 26, 1974, and released December 16, 1974, FCC 74-1042, 49 FCC 2d _____.

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[2]NARUC first formally made its request in its Motion for Summary Remand, which arrived at the Court for filing on January 20, 1975, the day that the Court entered its opinion herein. Copies of the orders were appended to the motion, and the Court's attention is respectfully invited thereto for the complete texts.

As NARUC shall show below, the FCC's decisions and orders instituting its economic impact investigation in Docket No. 20003 are fundamentally inconsistent with its posture before this Court, upon which the Court relied in affirming the order below. Accordingly, the legal basis for affirming the order has been vitiated and the cause must be remanded for further proceedings.

Similarly, the rules promulgated by the FCC in Docket 19555 to implement NEPA, together with its complete failure to consider environmental impact in granting construction permits to the specialized carriers, wholly upset the balance struck by the Court in declining to review NARUC's claims under NEPA. As a result, the balance should be restruck and the cause remanded.

III.

One of the principal assignments of error urged by the NARUC in this case is that the FCC failed to adequately investigate or consider the economic impact of its decision on the vast majority of the telephone using public. (See NARUC Initial Br., pp. 12-29; Reply Br., pp. 14-16). Although the Court recognized, as NARUC contended, that the FCC has a legal duty to consider economic impact, (Slip Op., p. 13) the Court summarily rejected NARUC's claim that the duty had been insufficiently met by holding that the FCC's treatment of this issue "is adequate." (Slip Op., pp. 24-25).

In so holding, the Court cited and obviously relied upon portions of the FCC's opinions below appearing at 29 FCC 2d 910-914, 917-920, and 31 FCC 2d 1107-1108. Without reiterating the FCC's discussion, it is sufficient to point out that the bottom line of those excerpts is the categorical FCC assertion that ". . . there is no valid basis for NARUC's assumption that such [specialized common carrier] entry

will prejudice the users of local telephone services." (31 FCC 2d at 1107-1108).

Nevertheless, on April 10, 1974, the FCC instituted an investigation in Docket No. 20003 of the very contentions which it previously categorically rejected, and upon which rejection this Court relied in affirming the FCC. In its Notice of Inquiry, the FCC specifically stated:

> We are particularly interested in obtaining information as to the comparative economic effects on both overall telecommunications costs and charges for different categories of public and business customers, of such factors as . . . the use of specialized common carrier services in lieu of common carrier private line services. . . . (FCC 74-344, Para. 1).

Moreover, in framing the general focus of the investigation, the FCC specifically keynoted that:

> In response to several recent Commission decisions [citing, *inter alia*, the decision herein under review] opening up related, specialized segments of the market for telecommunications services to competitive *vis-a-vis* traditional monopoly supply, the established carriers as well as some State regulatory authorities have raised the issue of possible adverse economic impact on other users of the basic nationwide switched telephone network. (FCC 74-344, Para. 4).

The fact that the FCC's decision to investigate economic impact jeopardized its previous assertions and its contentions to this Court was immediately noted by the specialized common carriers, who thereupon sought to scrub the investigation insofar as they are concerned. Thus, for example, in its initial comments filed with the FCC in Docket 20003, Data Transmission Company (Datran) (an

intervenor herein) argued at length that economic impact issues had already been laid to rest by the decision herein under review, and strenuously urged the FCC to abandon this part of its investigation. In pertinent part, Datran concluded:

> The economic impact issue as it applies to the specialized carriers should be deleted from this proceeding. Any reexamination of this issue based on the same old facts and arguments is unwarranted and especially premature, considering that a decision has not yet been rendered by the Ninth Circuit. *Any proceeding which might have an effect on such decision should be avoided.* In considering the parameters of the inquiry and the specific issues to be addressed therein, the Commission should narrow the proceeding by excluding the specialized common carrier questions. (Datran Comments, FCC Docket No. 20003, June 17, 1974. Emphasis added).

Nevertheless, the FCC denied Datran's request without discussion. (FCC 74-1345, Para. 8). Simultaneously, the FCC released its First Supplemental Notice in the investigation, which details the issues to be considered and the evidence to be adduced by the parties. (FCC 74-1346).

Heading the list of specific issues is whether ". . . under present ground rules, competition from specialized common carriers (SCC's) has resulted or will result in the imposition upon the public of . . . [h]igher rates for residential telephone service." (FCC 74-1346, Attachment A, Item Aa). Correlatively, another specific issue is the nature and extent of cross-subsidization policy changes made by the carriers as a result of the instant decision, as well as who benefits and who was penalized thereby. (*Id.*, Item J).

Moreover, specific data is being sought, *e.g.*, concerning the diversion of common carrier revenues by the specialized

common carriers (FCC 74-1364, Attachment B, Item J); the historical structure and origin of the market segment served by the specialized common carriers (*Id.*, Item K). Private line service demand shifts by users from telephone companies or Western Union to specialized common carriers (*Id.*, Item L); projections of specialized common carrier revenues, channel miles, trunk routes and capital expenditures (*Id.*, Item M); diversion by the specialized common carriers of ordinary long distance message toll revenues (*Id.*, Item N); and economies of scale in communications transmission systems (*Id.*, Item P).

The inconsistency of the FCC's position on economic impact is patent and cannot be escaped. The relevant issues to be addressed and data sought in Docket 20003 clearly have no parallel in the record below. Furthermore, in defending against NARUC's attack on that deficiency, the FCC claimed that such information is not necessary to a public interest determination because the contentions raised by NARUC are categorically without merit.

Now, however, FCC has decided that public interest considerations compel that such an investigation be held, and it rejected, without discussion, Datran's claim that the decision below had already laid the matter to rest.

The Court may no longer rely upon the FCC's discussion below as a basis for affirming its order, because the agency itself has taken action fundamentally inconsistent with its previous position.[3] Moreover, since the FCC itself created

[3]Cf. *Greater Boston Television Corporation v. Federal Communications Commission*, 444 F.2d 841, 851 (D.C. Cir. 1970) (courts must intervene in the administrative process when they become aware, from a combination of "danger signals," that the agency has not really taken a "hard look" at the salient problems, and has not genuinely engaged in reasoned decision-making); *HC&D Moving & Storage Company v. United States*, 298 F. Supp. 746, 751 (D. Haw. 1969) (courts

(continued)

the inconsistency, it cannot be cured by the post hoc rationalizations of appellate counsel. *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, 9 L.Ed. 2d 207, 216, 83 S.Ct. 239 (1962). Similarly, it has long been settled that a court must judge the propriety of an agency's action solely on the grounds invoked by the agency; and if those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more proper basis. *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 196, 91 L.Ed. 1995, 1999, 67 S.Ct. 1575 (1947).

Under these circumstances, the NARUC respectfully submits that the FCC itself is the only one who can cure its inconsistent position, and the only way this can be accomplished is by remand for reconsideration and appropriate further proceedings.

IV.

In striking the balance against review of NEPA issues herein, the most telling factor relied upon by the Court clearly was its belief that "[a]ny damage that might be done to NEPA interests by failure to review the NEPA questions now is problematical and, in any event, slight." (Slip Op., p. 38). The Court reasoned, essentially, that the "full context" of the NEPA claims could be considered by the FCC during the "separate hearings" which the Court believed would be held on each application for a construction permit. (*Id.* at 38-39).

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[3] (continued)
must be concerned with the consistency of administrative rulings, because to adopt different standards for similar situations is to act arbitrarily); Administrative Procedure Act, 5 U.S.C., Sec. 706(2)(A) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . .")

Nevertheless, the fact is that the FCC has already granted substantially all of the construction permits sought by the specialized carriers. Moreover, it has granted the permits on a segmented, route-by-route basis, without holding the hearings contemplated by the Court, and without giving *any* consideration to environmental effect — let alone the comprehensive analysis which the Court recognizes is necessary (See Slip Op., p. 39). Set out in the margin[4] are citations to the official reports of FCC orders to date approving such construction permits. The NARUC respectfully requests the Court to take judicial notice of these orders, and of the fact that no hearings were held and no consideration was given to environmental effect.

The reason for this anomalous state of affairs is fairly obvious. At the time the construction permits were granted, the FCC held a very narrow view of NEPA and believed that it could effectively "delegate" the responsibility for raising NEPA claims to private parties. This error has been corrected by the FCC's Report and Order in Docket No. 19555, *supra*.[5] The effect of the FCC's segmented approach to con-

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[4]MCI Carriers, 27 FCC 2d 380 (1971); 32 FCC 2d 36 (1971); 35 FCC 2d 98 (1972); 37 FCC 2d 1120 (1972) (four notations); Nebraska Consolidated Communications Corporation, 35 FCC 2d 991 (1972) (notation); Southern Pacific Communications Company, 37 FCC 2d 245 (1972); Western Tele-Communications, Inc., 35 FCC 2d 991 (1972) (notation); CPI Microwave, Inc., 37 FCC 2d 1120 (1972) (notation); Data Transmission Company, 34 FCC 2d 306 (1972); United States Transmission Systems, 48 FCC 2d 859 (1974). The NARUC is advised that other construction permits have been granted to some of the foregoing carriers for various routes. However, NARUC could find no official report of such actions, apparently because they were summarily granted. Obviously, therefore, no hearings were held or environmental impact considered during the course of such grants.

[5]See, *e.g.*, FCC 74-1042, Para. 7, wherein the FCC states that changes in the final rules, as compared with the proposed rules, reflect its "acceptance of responsibility for assessing the environmental significance" of its actions.

struction permits, however, combined with its own narrow view of its responsibility for assessing environmental impact, was to diffuse environmental issues and effectively preclude parties from raising them in meaningful fashion.

Furthermore, and perhaps most importantly, because the FCC's environmental rules did not become effective until January 20, 1975, specialized common carrier applicants for construction permits were not even required to submit information with their applications from which the FCC could have drawn conclusions as to environmental effect.

In summary, despite the FCC's statements to this Court, and its reliance thereon, that environmental issues could be considered at the construction permit stage, the FCC has successfully finessed that issue entirely. The NARUC respectfully submits, therefore, that the damage to NEPA interests, which would result from the Court's failure to review NEPA claims herein, is substantial and irreparable.

Another consideration of the Court in declining to grant review was that it did not have "the benefit of the Commission's views on even the threshold question of whether and to what extent NEPA applies in the peculiar substantive and procedural posture of this matter." (Slip Op., p. 40). The NARUC respectfully points out, however, that such FCC guidance as may be required for disposition of the issues herein[6] has been supplied by the Report and Order in Docket 19555, *supra*. (FCC 74-1042). In turn, a fair reading of that case requires this cause to be remanded.

First, the FCC's new rules clearly recognize that NEPA in general, and its environmental impact statement requirements in particular, *do apply* to rulemaking proceedings such as this. In this regard, Rule 1.303, 47 C.F.R., Sec. 1.303, specifically states:

[6]The Administrative Procedure Act, 5 U.S.C., Sec. 706 requires that ". . . *the reviewing court* shall decide all relevant questions of law. . . ." (Emphasis added).

> The Commission will . . . invoke and implement the environmental impact statement process before taking a position on . . . rule making matters which would have a significant effect on the quality of the human environment.

Second, facilities such as the FCC herein approved in principle are now considered to be major, within the meaning of NEPA, on the basis of their probable environmental effect. In its Report and Order, the FCC stated:

> In summary, the final rules identify types of facilities which are considered to be major on the basis of their probable environmental significance (see §1.1305). . . . (FCC 74-1042, Para. 9).

In turn, Section 1.1305(a)(2) specifies the following facilities:

> Private and common carrier microwave relay antenna towers or supporting structures exceeding 100 feet in height, excluding pole mounted microwave antennas.

Accordingly, the narrow issue presented, in light of the Report and Order, is whether the FCC must consider environmental impact in a proceeding to which NEPA clearly applies, when the result of the proceeding is to approve, as a matter of general policy, the construction of facilities which are likely to have a significant effect on the quality of the human environment. Additional guidance from the FCC on this issue would be superfluous; moreover, the answer clearly is that it must.

An additional factor in the Court's balancing herein is that resolution of NEPA issues ". . . cannot now be achieved without great delay, waste, and expense." (Slip Op., p. 40). Such consideration, however, is clearly misplaced in this case. The substantive legal omission is that of the FCC, not the NARUC. While telling this Court

that the construction permit stage would be adequate for considering environmental effect, the FCC made no move to do so. Whether by design or coincidence, the FCC sat on its rules implementing NEPA for more than two years after woefully inadequate ones (by the FCC's own admission) were proposed; and during that same time it continued to grant the construction permits without considering environmental impact at all. There is simply no evidence that the FCC has ever conscientiously sought to give full — or even partial — force to NEPA's "vital purposes" insofar as specialized common carrier policy is concerned.

Therefore, any "delay, waste, and expense" arising from remand at this point can be equally laid at the doorstep of the FCC itself, a fact which vitiates the force of this equitable consideration as a balancing factor in this case.

Two other factors relied upon by the Court in its balancing herein require brief correction. First, it does not necessarily follow that existing carriers would have built the facilities if the specialized carriers did not. (See Slip Op., p. 39). For example, building one high capacity microwave or other transmission system, rather than two or more smaller systems, may permit the construction of fewer total physical facilities, with consequently less environmental effect. Thus, there is no valid basis in this record for the Court's conclusion that a policy of competition *per se* does not carry with it significant environmental effect. (See Slip Op., p. 39).

Second, the "potential for abuse" which concerned the Court (Slip Op., p. 40) would not exist should the Court review the NEPA claims herein. The FCC's NEPA rules are now in effect, which should insure that environmental issues are automatically raised and considered on a "timely" basis in the future. It is now more than five years since NEPA became law, and the federal agencies have

generally, albeit somewhat grudgingly,[7] come to a realization of their responsibilities thereunder. In short, since NEPA is now an accepted fact of life for the federal agencies, the issue of timely raising NEPA claims is not likely to recur in the future.

In light of the foregoing, the NARUC respectfully submits that each of the factors relied upon by the Court as militating against review herein is without merit. Accordingly, giving "full weight to NEPA's vital purposes," as the Court recognizes it must, requires that the balance herein be restruck in favor of review and remand.

For the reasons stated above, therefore, the National Association of Regulatory Utility Commissioners requests that a rehearing be granted, and that on such rehearing the judgment of this Court be reversed, the order of the Federal Communications Commission below summarily reversed and the case remanded for reconsideration and appropriate further proceedings.

Respectfully submitted,

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[7] See, *e.g.*, Douglas, J., dissenting in part in *United States v. SCRAP*, 412 U.S. 669, 713, 714, 37 L.Ed. 2d 254, 284, 285, 93 S.Ct. 2405 (1973).

CERTIFICATE OF COUNSEL

The National Association of Regulatory Utility Commissioners, by its attorneys, hereby certifies that the foregoing petition for rehearing is not presented for the purpose of delay or vexation, but is, in the opinion of counsel, well founded in law and proper to be filed herein.

Dated this 31st day of January, 1975.

/s/ Paul Rodgers
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National Association of Regulatory
Utility Commissioners

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1550

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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BLEED THROUGH

IN THE

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OCTOBER TERM, 1974

No. 74-1550

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent, Data Transmission Company (DATRAN), requests that this Court deny a petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit entered in this case.

QUESTIONS PRESENTED

1. Whether a Federal Communications Commission ("FCC" or "Commission") rulemaking procedure liberalizing competitive policies for certain limited or "specialized" types of communications services was an abuse of that agency's authority.
2. Whether the initiation *per se* by the FCC of a broad inquiry into the economic impact of competition, in-

cluding competition from specialized carriers, negates a prior Commission decision that the foreseeable public interest benefits of the specialized carriers outweighed their potential adverse economic impact.

3. Whether the Court of Appeals has the discretion to balance the purposes of the National Environmental Policy Act of 1969 ("NEPA") [1] against the "insubstantiality" of the claimed environmental impact, an issue raised for the first time on appeal.

COUNTERSTATEMENT OF THE CASE

Petitioner seeks review of an affirmation by the Ninth Circuit Court of Appeals of a Commission rulemaking proceeding which liberalized policies to expand competition for certain "specialized" types of communications services.[2]

In its decision here challenged, the Commission promulgated liberalized policies expanding competition in the communications industry, indicating that it would authorize entry into certain limited segments of the communications market by applicants other than traditional communications common carriers. These "specialized" carriers, as they came to be known, had proposed to provide certain business communications services not previously available.

While the Commission's decision promulgated an expansion of its competitive policy, it was by no means a radical departure from then-existing Commission policy; rather, it was a single step in a progression of

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[1] 83 Stat. 852, *et seq.*, 42 U.S.C. § 4321, *et seq.* (1970).

[2] 513 F.2d 1142 (1975), affirming 29 F.C.C. 2d 870 (1971); Petitioner's Appendix 1a and 48a ("Pet. App.").

actions reflecting an historic Commission disposition in favor of competition where competition would better serve the public interest. In actuality, a mixture of regulated monopoly and competition characterized the structure of the telecommunications industry for many years prior to the Commission's challenged decision.

It is most significant that the controlling statute, the Communications Act of 1934, as amended,[3] nowhere addresses "monopoly" or, for that matter, any other concept respecting the economic environment in which interstate communications services must be provided. Competition was present prior to 1934, as it is today, and there clearly was no intent on Congress' part to legislate any particular economic framework in which communications were to be provided. Then, as now, the national economic policy, in its broadest sense, favored competition.

While the American Telephone and Telegraph Company ("AT&T") and the Western Union Telegraph Company ("Western Union") are commonly known as the "voice" carrier and the "record" carrier, respectively, those companies have competed to serve many commercial communications needs since the turn of the century. The dial-up or ordinary switched voice telephone service traditionally has been a monopoly for AT&T, and the ordinary telegram service a monopoly for Western Union.[4]

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[3] 48 Stat. 1064, *et seq.* (1934), as amended; 47 U.S.C. § 151, *et seq.* (1970).

[4] Western Union perfected its monopoly in domestic record telecommunications in 1943 when Congress amended the Communications Act to enable Western Union to absorb Postal Telegraph. Prior to that time, Western Union and Postal Telegraph were competitors in the truest sense of that term.

As early as 1931, however, AT&T was competing with Western Union for record communications services through its TWX service, a switched teletypewriter service.

Over a period of time, head-to-head competition developed with the introduction of private line tariff provisions which contained major offerings for services that were virtually identical for the two companies.[5] Western Union's Short Period Voice Service [6] and Broadband Exchange Service [7] completed a competitive collage of services for the unique design, communications needs or other specialized requirements of the business or organizational user.

The Commission recognized the existence and importance of private line competition when, by *Order* of September 6, 1956, [8] it added to the issues of its *Private Line Case*,[9] Docket Nos. 11645, 11646 and 12194, the following issue:

> "The effects of the tariff schedules subject to investigation herein on competition in the field of private line communications services and channels . . . ."

The Commission itself was in the process of evolving a policy of a broader outlook on communications com-

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[5] AT&T Long Lines Tariff F.C.C. No. 260 and Western Union Tariff F.C.C. No. 254, and their respective predecessors.

[6] Western Union Tariff F.C.C. No. 254.

[7] Western Union Tariff F.C.C. No. 246.

[8] See *Initial Decision*, Docket Nos. 11645, 11646, 12194, 34 F.C.C. 244, 245-46 (1961).

[9] The *Private Line Case* involved an investigation into the lawfulness of AT&T and Western Union private line tariff offerings.

petition from sources other than the "established" carriers such as AT&T and Western Union, for both equipment and services. In the equipment area, the Commission struck down as unreasonable certain restrictions on the attachment of and, subsequently, the interconnection of non-carrier provided equipment to carriers' facilities in *Hush-A-Phone*[10] and *Carterfone*,[11] respectively. Facilities competition—from the users themselves—was introduced by permitting a user to construct his own microwave network using certain frequencies.[12]

Finally, the FCC, in August 1969, authorized Microwave Communications Inc. ("MCI"), after hearing, to construct and operate a communications system between Chicago and St. Louis for the purpose of competing with AT&T and Western Union to serve the special needs of communications users. 18 F.C.C. 2d 953. This Commission action increased competition within the communications field, and it set the stage for further applications by other entities wishing to compete to satisfy specialized communications needs.

Authorization of MCI's proposal had taken six years, and, when other carriers, such as Interdata, DATRAN, additional MCI affiliates and others, submitted various applications and proposals to the Commission, it concluded that it would be necessary and

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[10] *Hush-A-Phone Corp.* v. *AT&T*, 22 F.C.C. 112 (1957).

[11] *In the Matter of Use of the Carterfone Device in Message Toll Telephone Service*, 13 F.C.C. 2d 420 (1968), *reconsideration denied*, 14 F.C.C. 2d 571 (1968).

[12] *In the Matter of Allocation of Frequencies in the Bands Above 890 Mc.*, 27 F.C.C. 359 (1959), *reconsideration granted*, 29 F.C.C. 825 (1960).

appropriate to resolve certain questions, which were presented by the applications of a large number of potential entrants, within a policy framework rather than on an *ad hoc* basis. On July 17, 1970, the FCC released a *Notice of Inquiry to Formulate Policy, Notice of Proposed Rulemaking, and Order.* 24 F.C.C. 2d 318 (1970). (Hereinafter "Notice.") [13]

The purpose of the *Notice* was to resolve, by rulemaking, fundamental policy and procedural questions which appeared common to all pending and potential applications prior to consideration of each application on its own merits. The FCC concluded that a rulemaking approach would be conducive to the prompt, orderly and efficient disposition of such questions, and would be far superior to the conduct of individual proceedings to address and resolve such questions. Finally, the *Notice* emphasized that, after the broad policy and procedural questions had been decided in the rulemaking proceeding, the FCC would consider each application on its individual merits, and would require each applicant to make a satisfactory showing that it was qualified; that the service it sought to offer was technically and economically sound; and that the proposed service would benefit the public interest.

After receiving comments from approximately 200 interested parties, and reply comments from those most

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[13] Apart from the success of MCI, a primary reason for the interest of potential new entrants in the common carrier field was the revelation that significant user groups, primarily data processors, were disenchanted with inadequate established carrier offerings. The Commission was apprised of this widespread and growing dissatisfaction through the conduct of its so-called *Computer Inquiry,* Docket No. 16979 (*see,* n.14, *infra.*), and its *Notice* was prompted in considerable part by expressions of user dissatisfaction. 24 F.C.C. 2d at 331.

directly concerned with the proceeding, the FCC held oral argument *en banc* and invited special rebuttal comments thereafter.

Finally, on June 3, 1971, the FCC released its *First Report and Order* liberalizing its policy with regard to new entry by entities wishing to enter the market and compete for specialized business communications. 29 F.C.C. 2d 870 (Pet. App. 48a).

In effectuating this liberalized policy, the FCC accepted its staff's findings that there was an increasing and widespread public demand for an availability of diverse and flexible means to satisfy specialized communications requirements, and that there was a substantial public need for the proposed service offerings of the specialized carrier applicants which had not been adequately met by the established carriers. The FCC concluded that these findings were supported by market studies, surveys and letters from users submitted by applicants, by responses submitted in the FCC's *Computer Inquiry,*[14] and by parties to the instant proceeding. Finally, the FCC found that the established carriers themselves did not dispute present and potential future growth of the specialized communications market, particularly the market for data communications.

In the *First Report and Order,* the FCC emphasized that specific benefits could be reasonably anticipated from the entry of new carriers in the specialized communications field. The FCC found that these benefits

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[14] *In the Matter of Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities,* 28 F.C.C. 2d 291 (1970), 28 F.C.C. 2d 267 (1971), *reconsideration denied,* 34 F.C.C. 2d 557 (1972).

included: flexibility and a wider range of choices to users; a dispersion of the burdens, risks and initiatives involved in specialized communications services; expansion of the capability of the communications industry to meet the rapidly growing demands of users; enlargement of the market for equipment manufacturers and stimulation of technological innovation; and provision of an additional regulatory tool which would assist the FCC in achieving its statutory objectives.

The FCC clearly recognized its public interest mandate under the Communications Act.[15] In addition, the FCC applied the principles enunciated in *FCC* v. *RCA Communications, Inc.*, wherein FCC authority to authorize competing common carrier facilities rested upon a finding by the agency that competition was reasonably feasible and could be expected to have some beneficial effect. 346 U.S. 86 (1953).

The Commission in the *First Report and Order*, 29 F.C.C. 2d at 920, adopted its staff's analysis of certain issues, including potential economic impact; such analysis addressed, *inter alia:*[16]

"Cream Skimming" (Paras. 36, 37, 38)

Effect on Rates and Prices of Existing Carriers (Paras. 39, 41)

Effect on Existing Carriers' Economies of Scale (Paras. 33, 34, 39)

Expansion of the Market (Para. 29)

Technological Advances (Para. 29)

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[15] See n. 3, *supra.*

[16] *Notice of Inquiry to Formulate Policy, Notice of Proposed Rule Making, and Order*, 24 F.C.C. 2d 318, 328 (1970).

Public Need and Demand (Para. 30)

Existing Carriers' Ability to Meet Need (Paras. 32, 34)

Beneficial Effect on Existing Carriers' Services (Para. 35)

In a *Memorandum Opinion and Order,*[17] released October 6, 1971 (Pet. App. 189a-194a), the Commission reviewed the arguments presented by the National Association of Regulatory Utility Commissioners ("NARUC") and the Washington Utilities and Transportation Commission ("WUTC") in their respective petitions for reconsideration and found them essentially repetitive of contentions previously advanced. (Pet. App. 191a). The Commission did, however, reiterate its findings with respect to the impact of specialized carrier entry on customers of the existing telephone companies for local telephone exchange service (Pet. App. 191a-193a), and it fully affirmed its policy determinations reached in the *First Report and Order.* (Pet. App. 193a).

NARUC and WUTC sought review of the Commission's decisions in the United States Court of Appeals for the Ninth Circuit, repeating previous arguments concerning economic impact and alleging, for the first time, that the FCC was required by NEPA [18] to determine the environmental impact of its policy, and that it had failed to do so.

The Court of Appeals affirmed the FCC's decision. 513 F. 2d 1142 (Pet. App. 1a).

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[17] 31 F.C.C. 2d 1106 (1971).

[18] See n. 1, *supra.*

The Court addressed in detail every argument raised by petitioner, addressing in pertinent part:

The Ability of the Existing Carriers to Serve the Need:

> "This statutory language does not suggest that the Commission is to give controlling weight to the mere fact that existing common carriers have the ability to perform the service an applicant wishes to furnish." (Pet. App. 23a).

The Impact of Competition on Existing Carriers:

> ". . . the Commission carefully weighed possible adverse effects of competition upon existing carriers and their services (29 F.C.C. 2d at 910-14) before finally concluding that a general policy of new entry would serve the public interest, convenience, and necessity." (Pet. App. 25a).

Duplication of Facilities:

> "The Supreme Court's disposition of *RCA Communications* is flatly inconsistent with NARUC's contention that new entry is impermissible if it will result in duplication of facilities of existing carriers capable of furnishing the service." (Pet. App. 25a).

The Sufficiency of the Record:

> "We are satisfied that 'there is sufficient relationship between the Commission's conclusion and the factual bases in the record upon which it relied to substantively support this exercise of its authority.' " (Citation and Footnote omitted). (Pet. App. 26a-27a).

Economic Impact:

> "It is argued that the Commission did not sufficiently investigate the nature and size of the mar-

ket or the potential economic impact of new entrants. The Commission specifically addressed itself to these contentions. 29 F.C.C. 2d at 910-14, 917-20; 31 F.C.C. 2d at 1107-08. Its response is adequate." (Pet. App. 27a).

The Appropriateness of a Rulemaking Proceeding:

"When, as here, the issue is resolved by adoption of a general policy for uniform application in the regulation of a nationwide industry, rulemaking is an entirely appropriate means for 'a particularization of the Commission's conception of the "public interest" sought to be safeguarded by Congress in enacting the Communciations Act of 1934.' *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 218 (1943)." (Pet. App. 34a).

The Necessity for Adjudicatory Comparative Hearings:

"The reasons given by the Commission in support of its conclusion that it would be contrary to the public interest and inconsistent with its policy determination in favor of new entry to limit entry among pending applications by holding comparative hearings on issues of economic exclusivity, are summarized in the margin. They reflect a careful consideration of the relevant factors, and a reasoned exercise of the Commission's discretion." (Footnotes omitted) (Pet. App. 38a-39a).

The Requirements of the National Environmental Policy Act:

"Giving full weight to NEPA's vital purposes, we conclude that in the particular circumstances of this case the balance should be struck against possible review and reversal of this Commission order on the ground NARUC seeks to raise for the first time in this court." (Pet. App. 40a-41a).

Following the Court's opinion affirming the Commission's decision, NARUC petitioned the Court for rehearing. The NARUC petition was summarily denied. (Pet. App. 47a).

To conclude the statement of facts and to complete the perspective of the policy development of which the Commission's *Specialized Carrier* decision is but one step, it should be pointed out that the Commission's overall liberalization of its competition policies continued with subsequent decisions permitting multiple competitive entry into the domestic telecommunications field by entities utilizing satellite technology.[19]

WHY PETITIONER'S WRIT SHOULD NOT BE GRANTED

Petitioner alleges in support of its writ: that the FCC's decision is an important one that fundamentally alters the structure of the communications industry; that it conflicts with the decision of this Court in *FPC* v. *Texaco, Inc.,* 417 U.S. 380 (1974), (hereinafter "*Texaco*"), in that it defers certain statutory duties to determination by the marketplace; that the Court of Appeals ignored what NARUC alleges is a subsequent proceeding inconsistent with the one under review herein; that this situation is an important matter of administrative law likely to recur; and lastly, that the Court "sanctioned" the FCC's failure to comply with the requirements of NEPA. (Pet. Brief 14-15).

At the outset, it should be noted that the Commission's decision here challenged is not, in itself, of such importance as to be worthy of this Court's considera-

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[19] See, *e.g., Establishment of Domestic Communications-Satellite Facilities by Non-governmental Entities,* 35 F.C.C. 2d 844 (1972).

tion. The *Specialized Carrier* decision represents but a single step in the continuing evolution of Commission policy toward fostering competition in the provision of communications services whenever, in the public interest, competition is deemed to be feasible and advantageous. In addition, the decision represents a promulgation of policy; it does not itself directly change the communications industry, since each applicant must qualify and be specifically authorized to enter the communications market.

Contrary to petitioner's assertion, the FCC's decision rendering possible "new" entry into the specialized segment of the communications market does not conflict with this Court's decision in *Texaco.* The action of the FPC differed so widely from that of the FCC in this case as to clearly render the two cases distinct.

The *Economic Impact Inquiry,* Docket No. 20003,[20] undertaken by the FCC subsequent to its *Specialized Carrier* decision, is not inconsistent with the prior decision, as alleged by NARUC, but it is fully consistent with that decision and the Commission's continuing responsibilities under its statutory mandate. It must be understood that this inquiry is far broader than petitioner implies (Pet. Brief 22), in that Docket No. 20003 focuses on the potential impact of subscriber-provided equipment and other types of interconnection to the telephone network, as well as specialized communications services, on telephone rates, users and services.

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[20] *In the Matter of Economic Implications and Interrelationships Arising from Policies and Practices Relating to Customer Interconnection, Jurisdictional Separations and Rate Structures,* 46 F.C.C. 2d 214 (1974), 49 F.C.C. 2d 1238 (1974).

As to the last of petitioner's contentions, it is clear that the Ninth Circuit Court of Appeals did not "sanction" an alleged failure by the FCC to consider the NEPA mandates. The Court, as the tribunal of the first instance (NARUC's failure to raise the NEPA issue below effectively precluded its address by the Commission), clearly recognized the weighty compulsion of NEPA and determined, on both procedural and public interest grounds, that the FCC's decision should not be overturned.

1. The FCC's Liberalized Competitive Policy for Specialized Communications Markets Is Consistent with the Applicable Legal Standards Set Forth in FCC v. RCA Communications, Inc., 346 U.S. 86 (1953), and Is Distinguished by Both the Controlling Statutes and the Facts from This Court's Determination in FPC v. Texaco, Inc., 417 U.S. 380 (1974).

Petitioner infers (Pet. Brief 16) that the Commission erroneously relied upon the premise of "competition for competition's sake" in adopting its policy of regulated competition in specialized communications services, and that this premise is contrary to decided case law and the standards respecting competition in the common carrier field established in *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953).

However, the Commission approached the question of whether to authorize the entry of new carriers with considerable care and awareness of the statutory requirements of the Communications Act and relevant legal standards. The Court of Appeals found that the Commission was fully conscious of the guidelines announced in *RCA Communications,* sought conscientiously to follow them, and clearly recognized that competition should not be authorized for competition's sake, but only if it were reasonably feasible and could

be expected to have some beneficial effect. (Pet. App. 25a).

The Commission's policy determination that the public interest would be served by entry of new carriers in the specialized communications field was based upon its own judgment, reached in a conscientious exercise of the discretion vested in it by Congress. (Pet. App. 25a). Such judgment was in accord with the "public interest, convenience and necessity" standard which is broadly stated in Sections 214 and 309 of the Communications Act.[21] (Pet. App. 111a-115a).

Petitioner tends to derogate the significance of the showings that individual applicants must make in order to receive authorizations to provide specialized services (Pet. Brief 18-19), and it attempts to demonstrate that the Commission intended to allow the marketplace to determine additional entry into communications common carriage. This is a misinterpretation of the Commission's intention.

In this proceeding, petitioner misapplies *Texaco,* which entailed the setting of natural gas rates which were by statute to be "just and reasonable". The Supreme Court, in deciding that the Federal Power Commission could not defer to the marketplace the setting of gas rates without determining that such rates met the statutory standard, stated:

> "For the purposes of the proceedings that may occur on remand, we should also stress that in our view the prevailing price in the marketplace cannot be the final measure of 'just and reasonable' rates mandated by the Act. It is abundantly clear from the history of the Act and from the events

[21] 47 U.S.C. §§ 214 and 309 (1970).

> that prompted its adoption that Congress considered that the natural gas industry was heavily concentrated and that monopolistic forces were distorting the market price for natural gas. [Footnote omitted] Hence, the necessity for regulation . . . ." 417 U.S. at 397.

This case is inapposite, as the proceeding under review herein simply is not a rate case; nor is there applicable herein a statutory standard inconsistent with the Commission's use of the communications market in lieu of comparative hearings for determining the number of carriers allowed and authorizations granted. Moreover, the proceeding before the FCC produced extensive market analyses and projections which the Commission considered in reaching its decision. (Pet. App. 92a-94a). After making its public interest findings, the Commission opted to permit the market to decide which of the new companies would achieve viability, instead of the Commission's doing so through comparative hearings. Of course, each applicant had to demonstrate that it was capable of operating as a specialized communications carrier. The Court of Appeals sustained the Commission's decision not to hold comparative hearings, so long as there were no exclusive authorizations granted. (Pet. App. 38a). The Federal Communications Commission did not defer to the marketplace its statutory duties as did the Federal Power Commission in *Texaco* and, therefore, there is no conflict with this Court's ruling in that case.

II. The Use of a Rulemaking Procedure Rather than Adjudicatory Hearings To Liberalize Competitive Policies for Certain Limited or Specialized Types of Communications Services Was Within the Commission's Authority Under the Communications Act.

In its *First Report and Order in* Docket No. 18920, the Commission reviewed its purposes for initiating the proceeding:

> "The *Notice* undertook to resolve in an overall policy and rule making proceeding certain basic policy and procedural questions . . . which appeared common to all of the applications and oppositions, prior to consideration of each proposal on its individual merits . . . . The Commission stated that such action would be conducive to prompt, orderly and efficient disposition of these matters and, in our opinion, would be preferable to decisions on them arrived at in the context of individual proceedings, and/or evidentiary hearings on each set of applications, or even a single, consolidated evidentiary hearing . . . ." (Pet. App. 50a-51a).

This is clearly within the Commission's exercise of its discretion as provided for by Congress in the Communications Act.[22] The Commission's mandate is "to make available, so far as possible, to all the people of the United States a rapid, efficient Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ." 47 U.S.C. § 151. In order to accomplish this goal, the Commission was vested with broad statutory authority and discretion in exercising its regulatory responsibilities in the communications field.[23]

Section 4(i) of the Communications Act authorizes the Commission to make such rules and issue such

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[22] See n. 3, *supra*.

[23] See *U.S.* v. *Southwestern Cable Co., et al.*, 392 U.S. 157 (1968).

orders as may be necessary in the execution of its functions, 47 U.S.C. § 154(i), and Section 4(j) specifically empowers the Commission to " . . . conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. § 154(j). Thus, the Communications Act bestows upon the Commission a comprehensive mandate with expansive powers and sufficient procedural flexibility to adjust its administrative process so that it may be responsive to the evolving communications technology.[24]

The choice between the Commission's proceeding by rulemaking or individual adjudication lies primarily in the informed discretion of the agency. *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1944). While Section 309(e) of the Communications Act [25] provides a statutory hearing requirement in applicable situations, it does not dilute the Commission's rulemaking authority where appropriate. The Commission distinguished, in this proceeding, between those policy and procedural matters common to all applicants which could be resolved in the context of rulemaking and those matters requiring consideration of each proposal on its individual merits. These principles have been consistently followed by the courts in approving administrative agency use of rulemaking powers to deny adjudicatory hearings apparently required by statute.[26]

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[24] See *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).

[25] 47 U.S.C. § 309(e) (1970).

[26] See, *e.g.*, *Bell Telephone Co. of Pennsylvania* v. *FCC*, 503 F.2d 1250 (3rd Cir. 1974), *rehearing denied*, October 30, 1974, *cert. denied*, June 16, 1975; *U.S.* v. *Florida East Coast Railway Company*, 410 U.S. 224 (1973); *FPC* v. *Texaco, Inc.*, 377 U.S. 33 (1964).

III. An Investigation by the Commission into the Economic Impact of Competition in Many Aspects of the Communications Industry, Including Specialized Carrier Competition, Is Not Inconsistent with a Prior Commission Finding that the Foreseeable Public Interest Benefits of Specialized Carriers Outweighed Their Potential Adverse Economic Impact.

The Commission adequately considered the impact of its decision on the telephone service rates paid by a majority of the public including, specifically, residential users. (Pet. App. 27a). The Court relied on the extensive record before the Commission which showed that the entry of specialized carriers would have no significant adverse impact on the rates or revenue requirements applicable to the essential services of the existing carriers. In fact, the Commission concluded that the "worst case" potential for adverse effects of new entry on the established carriers would be minimal. (Pet. App. 191a-192a).

The Commission balanced the public need for specialized communications services and the possible economic effect of such services on the existing carriers and concluded that there was no reason to anticipate any adverse impact on the service to the public by existing carriers, such as to outweigh the considerations supporting competition in specialized services. (Pet. App. 147a-148a). It was found that there was a public need and demand for the proposed facilities and services, and that there was a reasonable expectation that such competition would be beneficial.

In its *First Report and Order,* the Commission recognized that it was not determining for all time the effect of its policy, and it recognized its duty to review the impact of its decision:

> "As in the case of any policy or rule, the policy adopted here is, of course, subject to review in the

> light of changed circumstances and may be altered if it no longer comports with the public interest, convenience and necessity." (Citation omitted) (Pet. App. 160a).

In the Fall of 1973, AT&T petitioned the Commission to re-examine its specialized common carrier policy by conducting further proceedings.[27] The Commission dismissed the petition as premature and stated that there was no present basis for concern that the specialized common carriers would adversely affect the telephone system, users or services. The Commission also restated its position that its decision in Docket No. 18920 found and concluded that competition in the existing and potential specialized communications markets was reasonably feasible and offered substantial benefits to the public which outweighed any actual and potential detriments. 44 F.C.C. 2d at 471.

Again, on reconsideration, the Commission held that there had been no showing that there was a likelihood of the specialized carriers causing imminent and substantial injury to the public. 50 F.C.C. 2d at 419. However, the Commission emphasized its desire to obtain full information as to the economic effects of its specialized carrier authorizations and the public consequences of its competitive communications services policy, stating:

> "[S]hould future developments, which we will carefully monitor, indicate a need to review our current policy, we will of course take appropriate action on our own motion or upon a substantial

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[27] *In the Matter of Commission Policies Governing the Licensing and Regulation of Specialized Common Carriers*, 44 F.C.C. 2d 467 (1973), *reconsideration denied*, 50 F.C.C. 2d 416 (1974).

showing by any party that such action may be warranted." [28]

The Commission realized that it had a valid and continuing concern with the effects of its policy decisions on the rates and services of communications users, as well as a responsibility to be aware of changing circumstances and to review periodically its policies and rules to insure that they remain appropriate and timely. 50 F.C.C. 2d at 419.

Petitioner questions the consistency of the Commission's having instituted an economic investigation in its Docket No. 20003 [29] which, petitioner alleges, includes issues which should have been decided in the challenged proceeding. (Pet. Brief 22). It is clear that early in this proceeding there was little actual experience as to potential impact, and so, it was not inconsistent for the Commission to initiate a study of the effects of its decision in 1974. Indeed, it could be argued that a failure on the Commission's part to institute an inquiry to ascertain the effects of its competitive policies would have constituted a dereliction of its regulatory responsibilities.

The Court of Appeals recognized that the Commission was necessarily obliged to look prospectively at the economic impact argument in reaching its decision and that it is, therefore, not inconsistent for the Commission to look now retrospectively at its earlier decision in light of experience thus realized. (Pet. App.

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[28] 44 F.C.C. 2d at 471, n. 2.

[29] See n. 20, *supra*.

27a). In fact, the Commission's findings as to minimal impact (Pet. App. 134a) have been substantiated.[30]

The Commission's findings in Docket No. 18920 as to economic impact were correct under the circumstances existing at that time, and its treatment of related issues since that time has been altogether appropriate and reasonable. The Court of Appeals was correct in declining to "second guess" the Commission as to this matter and in not remanding on the basis of the Commission's instituting a new proceeding looking to the same or similar issues.

IV. The Court of Appeals Has Discretion To Balance the Purposes of NEPA Against the Insubstantiality of the Claimed Environmental Impact, Especially When the Issue Is Raised for the First Time on Appeal.

Petitioner, a party to the Commission's proceeding from the very beginning, did not raise the environmental issue before the Commission, but rather, belatedly raised it before the Court of Appeals, alleging NEPA's[31] relevance in this case. (Pet. Brief 23). Petitioner fully expected the Court to review such issue even though the Commission had no opportunity to decide whether and to what extent NEPA might apply to the particular substantive and procedural matters in this case. (Pet. App. 42a).

Section 405 of the Communications Act, 47 U.S.C. § 405, precludes judicial review of questions of law or

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[30] See Chairman Richard E. Wiley's statements before the Subcommittee on State, Justice, Commerce and the Judiciary of the House Appropriations Committee (May 7, 1975) and the Subcommittee on Communications of the Senate Committee on Commerce (April 21, 1975), in which Chairman Wiley concluded that the market penetration of the specialized carriers was negligible.

[31] See n. 1, *supra*.

fact which the Commission has not had an opportunity to pass upon. Therefore, the Court of Appeals was barred from considering the NEPA issue under the circumstances.

Petitioners never raised the NEPA question in its original comments or in its petition for reconsideration. Under Section 405, this was a condition precedent to judicial review of such question.

The Court, as the tribunal of the first instance as to this issue, properly refused to reverse the Commission (Pet. App. 40a) stating that:

> "Giving full weight to NEPA's vital purposes, we conclude that in the particular circumstances of this case the balance should be struck against possible review and reversal of this Commission order on the ground NARUC seeks to raise for the first time in this court. In reaching this conclusion, we do not mean to imply that an environmental impact statement would have been required had the issue been raised before the Commission."

This conclusion is consistent with that of the Court of Appeals in *Green County Planning Board* v. *FPC*, 455 F. 2d 412, 425 (2d Cir. 1972), *cert. denied*, 409 U.S. 849 (1972). There, petitioners offered no objections to the construction of electric transmission lines, and construction of the lines began pursuant to a final order of the Federal Power Commission. The Court of Appeals concluded that, as there was no significant potential for subversion of the substantive policies expressed in NEPA, there was no compelling reason for halting construction or reopening the authorization proceedings.

No construction was authorized by the Commission's decision herein, and therefore, a NEPA review was not required.[32] No formal impact statement was necessary at the time of the issuance of the Commission's policy on specialized communications services, as separate procedures were instituted for applications for authority to construct microwave facilities for such services. (Pet. App. 51a). The Commission's policy to permit regulated competition by qualified specialized carriers simply did not, in itself, authorize any particular microwave tower construction and thus did not require an environmental review.

As the Commission's decision simply addressed policy matters, petitioner was premature in seeking review of the failure to formulate a NEPA statement. Petitioner could have presented its position on the environmental issue to the Commission in opposition to one or more of the individual applications for construction permits; and, if the Commission failed to apply the proper standard, petitioner then might have obtained judicial review. (Pet. App. 41a). An environmental review might be called for in consideration of construction permit applications, but certainly not in consideration of an adoption of policy that might lead to such applications.

The Court recognized the lack of practical benefit of a NEPA review where systems already are constructed and companies are doing business. In addition, the Court recognized petitioner's failure to show that the FCC decision had injured the environment,

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[32] *In the Matter of Implementation of the National Environmental Policy Act of 1969*, 36 F.C.C. 2d 108 (1972), 49 F.C.C. 2d 1313 (1975).

and that such injury was irreparable and substantial.[33] The Court felt that any damage that might have been done to NEPA interests by its failure to review the NEPA questions was problematical and, in any event, slight (Pet. App. 41a), and that petitioner's claims of environmental impact did not appear to be substantial. In fact, there was no indication that the policy decision would cause any adverse impact on the environment.

Balanced against any possibility of adverse effect to the environment, which could have been timely raised by petitioner before the Commission, is the necessity for parties to be free from having to assume the risk of new issues being introduced as the administrative process proceeds in a given case. (Pet. App. 42a). The record compiled by the Commission contained no indication that a policy decision as to specialized communications services would in fact adversely affect the environment, and the Court of Appeals had little of substance to review as to this particular issue. Simple fairness demands that the parties know all the issues from the very beginning of the administrative process.

Petitioner's specific contentions as to the environmental impact of the Commission's decision lack merit. (Pet. App. 41a). The decision simply would not be the proximate cause of any ill effects upon the environment. Indeed, if the decision had not been made, the specialized communications services likely would have been furnished eventually by established carriers, using facilities (Pet. App. 41a) having the same potential impact on the environment as those utilized by new entrants.

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[33] See concurring opinion of Mr. Justice Blackman in *U.S.* v. *SCRAP*, 412 U.S. 669 (1973).

CONCLUSION

For the reasons stated herein, the petition for certiorari should be denied.

Respectfully submitted,

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July 29, 1975

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1550

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, et al., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE RESPONDENT SOUTHERN PACIFIC COMMUNICATIONS COMPANY IN OPPOSITION

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IN THE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF THE RESPONDENT SOUTHERN PACIFIC COMMUNICATIONS COMPANY IN OPPOSITION

Southern Pacific Communications Company (Southern Pacific), a party intervenor to the proceedings in the United States Court of Appeals for the Ninth Circuit whose judgment is sought to be reviewed, respectfully submits this brief in opposition to the petition of the National Association of Regulatory Utility Commissioners (NARUC) for a writ of certiorari in the above-entitled proceeding.

OPINIONS BELOW

The First Report and Order of the Federal Communications Commission (the Commission) is reported at 29 F.C.C.2d 870 (1971), and appears as petitioner's Appendix C (Pet. App. C). The Commission's Memorandum Opinion and Order denying reconsideration is reported at 31 F.C.C.2d 1106 (1971), and appears as petitioner's Appendix D (Pet. App. D). The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 573 F.2d 1142 (1975), and appears as petitioner's Appendix A (Pet. App. A).

JURISDICTION

The judgment of the Court of Appeals was entered on January 20, 1975. A petition for rehearing was denied by the Court of Appeals (Pet. App. B) on March 12, 1975. The petition for a writ of certiorari was filed on June 9, 1975. The time for all non-Federal respondents to file a response to the petition was extended by the Clerk to and including July 29, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Commission acted within its authority in adopting a general policy in a rule making proceeding that the public interest would be served by permitting the entry of competing new carriers in the field of specialized communications services, on the basis of more than 200 comments and reply comments, oral argument before the Commission en banc, and detailed factual determinations, forecasts, and expert judgments.

2. Whether the subsequent institution by the Commission of a fact finding inquiry into the economic implications and interrelationships of pricing practices and regulatory policies, required reversal of the Commission's determination in an extensive rule making proceeding that the anticipated beneficial effects from the entry of competing specialized carriers outweighed any possible adverse effects of competition upon existing carriers and their services.

3. Whether the failure of the Commission to discuss environmental impact in adopting a general policy extending competition in the field of specialized communications services required reversal, where none of the numerous parties participating in the general rule making proceeding had raised the issue before the Commission, and the issue was deemed by the Court of Appeals to be too insubstantial, and disruptive of the administrative process, to be considered for the first time on appeal.

STATEMENT OF THE CASE

In 1969, after an evidentiary hearing commenced six years earlier, the Commission authorized a new common carrier to provide specialized communications common carrier private line service [1] between St. Louis

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[1] Specialized common carriers are engaged in the transmission of communications (voice, data, or both), between intercity locations by full-time dedicated private circuits giving their customers continuous communications without requiring the carriers to establish a new connection for each call or message. See *Bell System Tariff Offerings*, 44 F.C.C.2d 245 (1973), 46 F.C.C.2d 413, 416 (1974), affirmed *Bell Tel. Co. of Pennsylvania* v. *FCC*, 503 F.2d 1250 (3rd Cir. 1974), petition for certiorari denied, *AT&T* v. *FCC*, 43 U.S.L.W. 3654 (June 16, 1975), petition for rehearing pending.

and Chicago in competition with the Bell System and The Western Union Telegraph Company.[2] After a large number of applications were thereupon filed by various companies to construct and operate microwave radio and other facilities to provide specialized communications services, particularly for data transmission,[3] the Commission instituted a rule making proceeding to formulate policy and to establish rules with respect to the specific issues, including particularly [4]

> A. Whether as a general policy the public interest would be served by permitting the entry of new carriers in the specialized communications field; and, if so,
>
> B. Whether comparative hearings on the various claims of economic mutual exclusivity among the applicants are necessary or desirable in the circumstances * * * .

More than 200 comments and reply comments were filed by interested parties, including the Department of Justice and the Small Business Administration,[5]

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[2] *Microwave Communications, Inc.*, 18 F.C.C.2d 953 (1969), reconsideration denied, 21 F.C.C.2d 190 (1970), modifications granted, 27 F.C.C.2d 380 (1971).

[3] As of March 15, 1971, 33 applicants had submitted 46 separate proposals for the operation of 1877 microwave stations. First Report and Order, *Specialized Common Carrier Inquiry*, 29 F.C.C. 2d 870, 871 fn. 1 (1971) (Pet.App. 50a), reconsideration denied, 31 F.C.C.2d 1106 (1971) (Pet.App. 189a), affirmed *Washington Utilities & Transportation Commission* v. *FCC*, 513 F.2d 1142, 1145 fn. 1 (9th Cir. 1975) (Pet.App. 2a), petition for writ of certiorari pending, *National Association of Regulatory Utility Commissioners* v. *FCC*, No. 74-1550.

[4] Notice of Inquiry to Formulate Policy, Notice of Proposed Rule Making, and Order, *Specialized Common Carrier Inquiry*, 24 F.C.C.2d 318, 327 (1970).

[5] See Appendix B to First Report and Order listing participating parties, Note 3 supra, 29 F.C.C.2d at 945-949.

and oral argument was presented before the Commission en banc on behalf of more than 30 parties over two days.

In an extensive First Report and Order,[6] the Commission carefully reviewed and considered the various contentions and materials submitted by the parties, including specifically the new, diverse, and improved services and benefits to be realized by the entry of additional competing specialized carriers, weighed against the possible adverse effects of competition upon existing carriers and their services,[7] and on the basis of various subsidiary factual determinations, forecasts, and expert judgments detailed in its report[8] unanimously reached the following ultimate findings and conclusion:[9]

> We find that: there is a public need and demand for the proposed facilities and services and for new and diverse sources of supply, competition in the specialized communications field is reasonably feasible, there are grounds for a reasonable expectation that new entry will have some beneficial effects, and there is no reason to anticipate that new entry would have any adverse impact on service to the public by existing carriers such as to outweigh the considerations supporting new entry. We further find and conclude that a general policy in favor of the entry of new carriers in the specialized communications field would serve the public interest, convenience, and necessity.

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[6] Note 3 supra. The First Report and Order covers 144 pages in petitioner's Appendix, pp. 48a-188a.

[7] Note 3 supra, 29 F.C.C.2d at 910-914 (Pet.App. 131a-138a), 513 F.2d at 1159 (Pet.App. 25a).

[8] Note 3 supra, 513 F.2d at 1156 (Pet.App. 20a).

[9] Note 3 supra, 29 F.C.C.2d at 920 (Pet.App. 147a-148a).

The Commission also concluded that it would be contrary to the public interest and inconsistent with its policy determination in favor of entry to attempt generally to limit entry among pending applicants by holding comparative hearings on issues of economic exclusivity.[10]

On reconsideration, the Commission rejected "the somewhat novel, but legally dubious, claim" of the National Association of Regulatory Utility Commissioners (NARUC), petitioner herein, that the Commission should pursue a policy of generating excess interstate earnings which should be applied to subsidize the revenue requirements applicable to local exchange services subject to state regulatory jurisdiction:[11]

> The Commission fully appreciates the objective of the NARUC to minimize the rates and revenue requirements of the telephone companies applicable to intrastate local services. We do not believe, however, that either as a matter of law or practice, this can be accomplished by arbitrarily inflating the cost of service subject to Federal jurisdiction and deflating by like amount the costs applicable to services subject to state jurisdiction. The allocation of joint costs incurred in furnishing telephone services subject to both Federal and state jurisdiction is, of course, a complex and at times controversial matter. Nevertheless, it is incumbent upon Federal and state rate-making authorities, as a matter of law to employ allocation procedures which will fairly and reasonably reflect the legitimate costs of each service. See *Smith* v. *Illinois Bell Tel. Co.*, 282 U.S. 133 (1930); *Minnesota Rate Cases*, 230 U.S. 352 (1913). Allo-

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[10] Note 3 supra, 29 F.C.C.2d at 923 (Pet.App. 153a).

[11] Note 3 supra, 31 F.C.C.2d at 1108 (Pet.App. 192a-193a).

> cations cannot and should not be designed to artificially shift any part of the revenue requirement applicable to one jurisdiction into another. This, clearly, would lead to confusion, if not chaos, in maintaining a system of dual Federal/State regulation on a rational and manageable basis. As the NARUC is well aware, procedures and mechanisms are available and have been employed over the years on a cooperative Federal/State basis as a means of establishing and maintaining fair and equitable jurisdictional allocations. This proceeding is not the appropriate forum to address that subject.

Petitions for review were filed by the Washington Public Utilities Commission and NARUC, but not by the Bell System or by Western Union. While the petitions for review were pending, the Commission in August, 1972, issued a notice of proposed rule making to implement the National Environmental Policy Act of 1969 (NEPA),[12] and in December, 1974, issued a report and order adopting rules and regulations in which it identified enumerated types of facilities considered to be major and required that information relating to such facilities be submitted to the Commission with applications for construction permits after January 20, 1975, so that environmental impact statements might be required where the environmental consequences were considered to be significant.[13]

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[12] Notice of Proposed Rulemaking, *Implementation of the National Environmental Policy Act of 1969*, 36 F.C.C.2d 108 (1972).

[13] Report and Order, 49 F.C.C.2d 1313 (1974). Microwave antenna towers over 100 feet, but other towers over 300 feet, are considered major facilities. The Commission is giving consideration to the disparity in treatment of tower heights. 50 F.C.C.2d 814 (1975).

BLEED THROUGH

In April, 1974, the Commission instituted an inquiry "into the effect of current pricing practices and regulatory policies on the level and distribution of customer charges for various telecommunications services, and in particular on the extent to which various categories of customers are now or will be under alternative pricing practices and regulatory policies subsidizing the services required by others." [14] In the notice of inquiry, and later in a memorandum opinion and order [15] and in a first supplemental notice,[16] the Commission emphasized that the purpose of the inquiry was to gather information, views, and comments from interested persons for the benefit of the Commission, state utility commissions, regulated carriers, and others, as primarily a fact-finding inquiry, and that it was not proposing in the particular proceeding to adopt any rules or policies, as such.

The United States Court of Appeals for the Ninth Circuit issued its opinion and judgment on January 20, 1975,[17] holding that petitioners had standing to bring petitions for review, but affirming in all respects that the Commission had met the substantive and procedural requirements of the Communications Act of 1934, as amended, in weighing the asserted benefits and possible adverse effects of competition, and in proceeding by rule making to determine policy; that the

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[14] Notice of Inquiry, *Economic Implications and Interrelationships Arising From Policies and Practices Relating to Customer Interconnection, Jurisdictional Separations and Rate-Structures*, 46 F.C.C. 2d 214 (1974).

[15] 49 F.C.C.2d 1238 (1974).

[16] 50 F.C.C.2d 574 (1974).

[17] Note 3 supra (Pet.App. A).

Commission had properly given careful consideration to the relevant factors in concluding that comparative hearings for the applicants were neither necessary nor desirable; and that in the particular circumstances of this case, the balance should be struck against review and reversal because the Commission had not considered the environmental impact of its policy, a matter raised for the first time on appeal.

ARGUMENT

1. Contrary to NARUC's contention, the Commission's policy determination in this case to permit the entry of new carriers in the field of specialized communications is not in conflict with this Court's ruling in *FPC* v. *Texaco, Inc.*,[18] holding that a regulatory agency cannot place exclusive reliance on the prevailing price in the marketplace to determine whether rate are "just and reasonable" under its statutory mandate.

In the *Texaco* case, this Court held that an FPC order which provided a blanket certificate procedure for small producers of natural gas was too ambiguous because it did not disclose the basis of its order with sufficient clarity. The FPC had not exercised its discretion to insure that the sales price for the gas would be "just and reasonable" as mandated by the applicable statute.[19] For the purpose of the proceedings that might occur on remand, this Court stressed that "the prevailing price in the marketplace cannot be the final measure of 'just and reasonable' rates", inasmuch as the Congress had subjected producers to regulation

[18] 417 U.S. 380 (1974).

[19] 417 U.S. at 395-397.

because it had recognized the anticompetitive conditions in the industry.[20]

The *Texaco* case is completely inapposite here. As the Court below recognized, the Commission was fully conscious of the guidelines announced by this Court in the *Three Circuits* case, *FCC* v. *RCA Communications Inc.*,[21] concerning the weight to be given competitive considerations, and sought conscientiously to follow them in concluding that the reasonable expectation of some beneficial effects from the new entry outweighed the possible adverse effects of competition upon existing carriers and services.[22] By no means did the Commission thereby abdicate its regulatory functions to the marketplace. Unlike the FPC in the *Texaco* case, which merely asserted in generalities that it "shall consider all relevant factors",[23] this Commission specifically and in express detail weighed all the relevant considerations in reaching its conclusions, including the nature and extent of the potential market, the public need and demand for the specialized new and improved services by diverse and flexible means offered by the new carriers, and the insubstantial effect of the new entry upon the resources, revenues, and services

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[20] 417 U.S. at 397-399.

[21] 346 U.S. 86 (1953).

[22] Note 3 supra, 513 F.2d at 1159 (Pet.App. 23a). The Third Circuit has also ruled that the Commission's First Report and Order in the *Specialized Common Carrier Inquiry* "fully comports with the principles articulated in RCA. * * * We regard the listing of factors (independent of competition) and the identification of benefits (reasonably expected) as proof that the FCC viewed competition as a means, rather than as a goal in and of itself," in this proceeding. *Bell Tel. Co. of Pennsylvania* v. *FCC*, note 1 supra, 503 F.2d at 1271, 1272.

[23] Note 18 supra, 417 U.S. at 397.

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of the existing established carriers.[24] The Commission pointed out that its disposition of the policy aspect did not constitute a determination that all or any of the pending applications will be granted, since each application must still meet the applicable statutory standards and comport with the Commission's established policies, and each applicant must make a satisfactory showing that it is qualified and the service it seeks to offer is technically and economically sound and otherwise in the public interest.[25] Thereafter, upon grant of its applications, each applicant becomes subject to the full sweep of Commission regulation over interstate carriers under the Communications Act of 1934, as amended.

Unlike *Texaco,* where the market was characterized by anticompetitive practices, and the Commission merely indicated in generalities that it intended to review new contract prices,[26] the Commission below particularized how its rate making and regulatory policies and practices would be appropriately adapted to promote and maintain an environment of free and open competition in the sale of specialized services.[27] Unlike *Texaco,* where the Commission was found to have placed *exclusive* reliance upon market factors, rather than considering the market to be one relevant factor to be taken into consideration,[28] the Commission below did consider many other factors beyond the

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[24] Note 3 supra, 29 F.C.C.2d at 904-920 (Pet.App. 117a-147a).

[25] Note 3 supra, 29 F.C.C.2d at 900 (Pet.App. 110a-111a).

[26] Note 18 supra, 417 U.S. at 397-399.

[27] Note 3 supra, 29 F.C.C.2d at 915-917 (Pet.App. 139a-142a).

[28] Note 18 supra, 417 U.S. at 399, 400.

marketplace, and retained jurisdiction to examine the qualifications of each applicant and to review its procedures in the light of experience. It considered other factors such as the desirability of avoiding delay in the institution of services needed by the public now, the benefit to the public in the availability of diverse options, the lack of public detriment in the event some new carriers should fail, and the ability of the Commission to review the policy later in the light of changed circumstances, in concluding that it would be contrary to the public interest and inconsistent with its policy determinations to attempt generally to limit entry among pending applicants by holding comparative hearings on issues of economic exclusivity.[29]

2. NARUC is incorrect that the Commission's action in 1974 instituting an inquiry into the economic implications and interrelationships of current pricing practices and regulatory policies is in any wise inconsistent with the Commission's policy in favor of entry of new carriers. The notice of inquiry and the subsequent Commission memorandum opinion and order and supplemental notice do not in the least question the soundness of the First Report and Order in the *Specialized Common Carrier Inquiry*,[30] but to the contrary stress that the purpose of the inquiry is only to gather information, views, and comments from interested persons for possible future proceedings, but not to adopt any rules or policies, as such, in the particular proceeding.[31]

As the Court of Appeals below observed, "Against these benefits [of new entry], the Commission carefully

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[29] 29 F.C.C.2d at 923-927 (Pet.App. 153a-160a).

[30] Note 3 supra.

[31] Notes 14-16 supra.

weighed possible adverse effects of competition upon existing carriers and their services (29 F.C.C.2d at 910-14) [Pet. App. 130a-138a] before finally concluding that a general policy of new entry would serve the public interest, convenience, and necessity."[32] NARUC's principal contention, that new entry would siphon off interstate revenues and earnings from the telephone companies used to subsidize local exchange service, was rejected by the Commission as "legally dubious", since "[a]llocations cannot and should not be designed to artificially shift any part of the revenue requirement applicable to one jurisdiction into another."[33] The fact finding inquiry into economic implications and interrelationships looks to the future, not to any reevaluation of the Commission's decision in the *Specialized Common Carrier Inquiry* to authorize the entry of new carriers into the field of specialized communications, and the inquiry is not designed or constituted so as to produce a reversal of the Commission's policy.

3. Finally, NARUC's contention that the Court of Appeals below was required to reverse the Commission's decision because the Commission had failed to consider the environmental impact of its policy under NEPA is wholly without substance. The Court of Appeals recognized that it could remand even though the issue had not been raised before the Commission, but it also recognized that any damage that might be done at the review stage to NEPA interests was "problematical and, in any event, slight"; that NARUC's claim of environmental impact did not ap-

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[32] Note 3 supra, 513 F.2d at 1159 (Pet.App. 25a).

[33] Note 3 supra, 31 F.C.C.2d at 1108.

pear particularly substantial, since the basic question was who would furnish the service (the new or the established carriers), not whether it would be furnished, or how much; and that a resolution of the NEPA issue now would create great delay, waste, and expense outweighing any benefit from reviewing the NEPA question at this late stage.[34] The matter was well within the Court's discretion.

Significantly, despite the expressed concern of NARUC with the environmental impact of microwave operation, neither NARUC nor any Federal or State agency, including those expressly charged with environmental responsibilities, sought to challenge any of the specialized carrier applications pending before the administrative agency, where environmental considerations can be weighed in the context of the specific proposals for tower height, radiated power, site location, and other characteristics of the radio microwave stations to be constructed.

4. Contrary to NARUC's contentions (pp. 14-15), there are no issues presented here of great public importance or great precedential significance. The entry of the specialized carriers is unlikely to have any significant impact on telephone revenues—in the last calendar year, the total annual revenues of both the specialized and the domestic satellite carriers amounted to approximately $15 *million,* or less than 5/100 of one per cent of the $31.6 *billion* in total revenues of the telephone companies.[35] As the Commission pointed out

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[34] Note 3 supra, 513 F.2d at 1167-1169.

[35] Remarks by Walter R. Hinchman, Chief, Common Carrier Bureau, Federal Communications Commission, before the 28th Annual Conference of the International Communications Association, San Francisco, California, May 16, 1975.

in its First Report and Order, even if the most sanguine expectations of the new carriers were realized, there is no reason to believe that there would be any substantial diversion of telephone revenues, or any significant adverse impact on telephone users, the installation of large capacity systems to meet growing requirements, or the realization of declining unit costs.[36] The insignificance of the NEPA issue can be seen from the circumstances that it did not occur to a single party filing the 200 pleadings before the Commission, and only to one of the petitioners for review; that the Commission after comprehensive consideration could see no need to establish an effective date before January 20, 1975; and that since the effective date of the new rules, it has played no significant role in the processing and grant of microwave radio applications.

The assertion of NARUC (p. 15) that the Commission's decision will fundamentally alter the structure of communications services to the public is without foundation. As the Commission observed, "we see no reason whatsoever to assume that the [specialized carrier] applications would divert all or even a substantial portion of that comparatively small percentage of existing and projected Bell System business that is vulnerable to competition."[37] The Commission's decision implements a continuing policy to foster competition in communications where it would serve some

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[36] 29 F.C.C.2d at 912 (Pet.App. 83).

[37] Note 3 supra, 29 F.C.C.2d at 912 (Pet.App. 133a).

public benefit.[38] It should be noted that the implication of NARUC's position that the Bell System is the chosen instrument of domestic communications was also breached by the Commission's decision to permit competition in providing private line and even long distance telephone service by domestic satellite carriers, without challenge by NARUC.[39]

The assertions of NARUC, as the sole petitioner before this Court, must be measured against its primary interest in this litigation in promoting a policy of generating excess interstate earnings to be applied to subsidize local exchange revenue requirements, although the Commission has said that this proceeding is not the appropriate forum to address that subject.[40] To be noted is the absence of other petitioners with a public or private interest in the resolution of the proceeding, including any Federal or State agency charged with

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[38] E.g., international record common carrier services, *Mackay Radio and Telegraph Co.*, 19 F.C.C. 1321, 1334 (1955), affirmed *RCA Communications* v. *FCC*, 238 F.2d 24, 27-28 (D.C. Cir. 1956), certiorari denied, 352 U.S. 1004 (1957); transatlantic cables, *AT&T (TAT-4)*, 37 F.C.C. 1151, 1158-1159 (1957); *Domestic Satellite Service*, 42 F.C.C.2d 654 (1973); domestic mobile telephone service, *General Mobile Radio Service*, 13 F.C.C. 1190, 1218 (1949); private microwave use, *Allocation of Frequencies Above 890 Mc*, 27 F.C.C. 359, 412 (1959); data processing, *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Service and Facilities*, 28 F.C.C. 2d 267 (1971), reconsideration denied, 34 F.C.C.2d 577 (1972), modified *GTE Service Corp.* v. *United States*, 474 F.2d 724 (2d Cir. 1973).

[39] *Establishment of Domestic Communication-Satellite Facilities by Nongovernmental Entities*, 35 F.C.C.2d 844, reconsideration granted in part, 38 F.C.C.2d 665 (1972); *Network Project* v. *FCC*, 511 F.2d 786 (D.C. Cir. 1975).

[40] Note 3 supra, 31 F.C.C.2d at 1108 (Pet.App. 192a-193a).

public interest responsibilities, the established carriers themselves, including the Bell System, Western Union, or independent telephone companies, or any communications users or other members of the public. It is particularly noteworthy that although the standing of NARUC was accepted by the Court of Appeals as the representative of state regulatory agencies,[41] in two states where specialized carriers have sought state certificates of convenience and necessity to provide intrastate communications service, the Corporation Commission of the State of Oklahoma[42] and the Public Utilities Commission of the State of California[43] have both granted such certificates, with conditions, on the basis of the benefits to the public to be realized by the entry of competing carriers in meeting the growing demand for specialized communications services.

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[41] Note 3 supra, 513 F.2d at 1154-1155 (Pet.App. 16a-18a); *but see* concurring opinion of Circuit Judge Wallace rejecting this position, 513 F.2d at 1169-1171 (Pet.App. 45a).

[42] *In the Matter of the Application of United Video, Inc., a Corporation, for a Certificate of Convenience and Necessity to Operate a Telephone Company to Serve the Territory Within the Corporate Limits of the Cities of Tulsa and Oklahoma City, Oklahoma,* Cause No. 24892 (Okla.Corp.Comm. Nov. 14, 1974), petition in error pending (Okla.Sup.Ct. No. 48045). Southern Pacific is the successor in interest to the specialized carrier facilities of United Video, Inc.

[43] Interim Opinion, *Pacific Tel. & Tel. Co.* v. *Southern Pacific Communications Co.,* Case No. 9728 (Cal.PUC Decision No. 84167, March 4, 1975).

CONCLUSION

The petition for writ of certiorari should be denied.

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July 29, 1975

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74–1550

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

BRIEF FOR RESPONDENTS MCI CARRIERS AND N-TRIPLE-C INC. IN OPPOSITION

Respondents MCI Carriers[1] and N-Triple-C Inc.[2] (hereinafter sometimes referred to collectively as MCI),

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[1]The MCI Carriers are Microwave Communications, Inc. and MCI Telecommunications Corporation. The following companies, initially listed among the MCI Carriers in the proceeding before the court below, were subsequently merged into MCI Telecommunications Corporation: MCI New England, Inc., MCI Pacific Coast, Inc.,

respectfully submit their brief in opposition to the petition of the National Association of Regulatory Utility Commissioners (NARUC) for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The January 20, 1975 opinion of the court of appeals (Pet. App. 1a-46a) is reported as *Washington Utilities & Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1975). Rehearing of the matter was denied on March 12, 1975 (Pet. App. 47a). The decision of the Federal Communications Commission (FCC or the Commission) under review (Pet. App. 48a-188a) is reported as *Establishment of Policies and Procedures for Consideration of Applications to Provide Specialized Common Carrier Services in the Domestic Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43 and 61 of the Commission's Rules*, 29 FCC 2d 870 (1971) (*Specialized Carrier* decision). The Commission's order denying reconsideration (Pet. App. 189a-194a) is reported at 31 FCC 2d 1106 (1971).

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on January 20, 1975. A petition for rehearing was

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MCI-North Central States, Inc., MCI Mid-Continent Communications, Inc., MCI Texas-Pacific, Inc., MCI St. Louis-Texas, Inc., MCI Michigan, Inc., MCI Pacific-Mountain States, Inc., MCI Southeast Communications, Inc., MCI Texas East Microwave, Inc., MCI Kentucky Central, Inc., MCI Indiana-Ohio, Inc., MCI Mid-Atlantic Communications, Inc., MCI Mid-South, Inc., Interdata Communications, Inc. and MCI-New York West, Inc.

[2]Formerly Nebraska Consolidated Communications Corp.

denied on March 12, 1975 (Pet. App. 47a). The petition for a writ of certiorari was filed on June 9, 1975. By order dated June 20, 1975, the Clerk of the Court granted an extension of time to July 29, 1975 within which to file briefs to all non-Federal respondents. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission's authority to permit entry into the business and data communications market by way of a rulemaking proceeding was curtailed by this Court's subsequent decision in *FPC v. Texaco, Inc.*, 417 U.S. 380 (1974), which dealt with the indirect regulation of the rates of small natural gas producers.

2. Whether the Commission's decision favoring entry of new specialized carriers should be reversed by this Court on the ground that the FCC subsequently instituted a fact-finding inquiry into the economic implications of interrelationships of a wide variety of common carrier regulatory practices.

3. Whether the FCC's policy favoring entry of specialized carriers should be reversed because the Commission did not issue an environmental impact statement in a proceeding where no one had even suggested the existence of an environmental question and where the facilities involved have already been constructed.

STATEMENT OF THE CASE

Background

For the past sixteen years the FCC has authorized the use of private microwave systems by businesses and other entities to satisfy their own communications requirements. *In the Matter of Allocation of Frequencies in the Bands Above*

890 Mc., 27 FCC 359 (1959), 29 FCC 825 (1960). In its *Above 890 Mc.* decision, *supra*, the Commission rejected claims by the established carriers that the licensing of private users would financially burden such carriers and their other customers. 27 FCC at 387-390, 411; 29 FCC at 849-852.

In 1963, when Microwave Communications, Inc. (Microwave) filed applications with the FCC to construct a specialized communications common carrier system between St. Louis and Chicago, it was essentially proposing to make available, to users too small to construct their own private microwave systems, the advantages of microwave technology in forms designed to meet their specialized needs. In 1969, after a full evidentiary hearing, the FCC granted the required authorizations to Microwave upon a finding that competition was reasonably feasible and could be expected to provide some public benefits. *Microwave Communications, Inc.*, 18 FCC 2d 953 (1969), *reconsideration denied*, 21 FCC 2d 190 (1970). AT&T and Western Union initially appealed the decision, but then moved to dismiss their own appeals. *AT&T v. FCC*, Nos. 23,959, 23,960, 71-1130, 71-1131 (D.C. Cir., dismissed 1971).

Proceedings Before the FCC Below:

The grant to Microwave Communications, Inc. resulted in the filing of a large number of applications for authority to provide a variety of interstate specialized communications services. Rather than initiating separate proceedings as to each of the applicants, the Commission decided to conduct a general rulemaking proceeding to resolve the common policy issues presented by their applications. *Specialized Common Carrier Services* (Docket No. 18920), 24 FCC 2d 318 (1970). The Commission stated the issues to be addressed as follows (24 FCC 2d at 327):

A. Whether as a general policy the public interest would be served by permitting the entry of

new carriers in the specialized communications field; and, if so,

B. Whether comparative hearings on the various claims of economic mutual exclusivity among the applicants are necessary or desirable in the circumstances;

C. What standards, procedures and/or rules should be adopted with respect to such technical matters as the avoidance of interference to domestic communications satellites in the 6 GHz band, the avoidance or resolution of terrestrial frequency conflicts and route blockages both vis-a-vis the facilities of established carriers and among the applicants, and the use of frequency diversity;

D. Whether some measure of protection to the applicants' subscribers is called for in the area of quality and reliability of service; and

E. What is the appropriate means for local distribution of the proposed services?

The Commission's order instituting the proceeding provided that, once these broad policy questions had been answered, it would "consider each proposal on its individual merits and follow such procedures as may be necessary to resolve any remaining questions pertinent to the particular set of applications." 24 FCC 2d at 327. The FCC also invited the parties to suggest additional questions for consideration in the rulemaking proceeding. 24 FCC 2d at 349.

In the extensive proceeding that followed, voluminous comments were filed by the specialized common carrier applicants, AT&T and its operating companies, independent telephone companies, other carriers, scores of businesses and business associations, and other interested parties, including the petitioner here. All of the parties were also given an

opportunity to present their views and arguments at a lengthy oral argument before the Commission *en banc*.

With respect to Issue A, the FCC concluded as follows (Pet. App. 147a-148a):

> We find that: there is a public need and demand for the proposed facilities and services and for new and diverse sources of supply, competition in the specialized communications field is reasonably feasible, there are grounds for a reasonable expectation that new entry will have some beneficial effects, and there is no reason to anticipate that new entry would have any adverse impact on service to the public by existing carriers such as to outweigh the considerations supporting new entry. We further find and conclude that a general policy in favor of the entry of new carriers in the specialized communications field would serve the public interest, convenience, and necessity.

As to Issue B, the Commission concluded "that it is not necessary or desirable in the public interest to hold comparative hearings for the purpose of restricting new entry in any particular area to only one private line applicant" (Pet. App. 159a). With respect to Issue C, the Commission adopted various technical changes in Part 21 of its Rules (47 CFR Part 21) to improve spectrum utilization. The Commission deferred final action on Issues D and E, although it reaffirmed the view, expressed in the Notice originating the procedure, that the established carriers should provide interconnections to the specialized carriers on a reasonable and nondiscriminatory basis.

After issuance of the Commission's *Specialized Carrier* decision, the National Association of Regulatory Utility Commissioners (NARUC) and the Washington Utilities and Transportation Commission (WUTC) filed petitions for reconsideration of the decision with respect to Issues A and

B. NARUC argued that competition would divert revenues from the existing carriers and cause higher intrastate rates. The Commission denied reconsideration, concluding that (Pet. App. 191a-192a):

> . . . NARUC offers no factual or other record support for these bold assumptions. Nor does the NARUC challenge any of the detailed findings made by the Commission on the basis of the extensive record herein that such new entry will have no significant adverse impact on the rates or revenue requirements applicable to the essential services of the existing carriers. Specifically, the Commission found that there is substantial evidence of a rapidly growing market for new and diversified communication services to meet the changing and expanding communications requirements of the public; and that the public interest in efficient and economical communications would best be served by authorizing additional carriers to compete with the existing carriers in serving that market. In reaching this conclusion, the Commission considered the technical and other limitations presently existing in the plant, operations and other capabilities of the existing carriers. The Commission also concluded that any potential adverse effects of such new entry on the existing carriers and their customers would be minimal, if any at all. In this connection, the Commission found that the revenues of the Bell System from the specialized communications services constituted a relatively small percentage of the total communications market now being served or expected to be served by the Bell System; that the Bell System is likely to obtain a very substantial share of the new market; and that any adverse effects on Western Union are not expected to be of sufficient magnitude to justify depriving the public of the benefits that the Commission warrants may

reasonably be anticipated by permitting new entry into the specialized communications field.

The Court's Decision

The U.S. Court of Appeals for the Ninth Circuit, without dissent, affirmed the Commission's decision in all respects. *Washington Utilities & Transportation Commission v. FCC* (Pet. App. 1a).

Related Proceedings Subsequent to FCC Decision

After its *Specialized Carrier* decision, the Commission undertook detailed review of the 1877 then pending individual specialized carrier applications. This took a substantial period of time. A significant number of applications had to be withdrawn, while virtually all the applications required amendment. Only 13 applications had actually been granted by the end of 1971. Another 126 were granted during the first half of 1972 and another 424 during the second half of 1972. In the years since, the Commission has acted upon nearly all of the applications which were actively prosecuted. Extensive construction has taken place and operations have commenced. MCI, for example, now operates a transcontinental system providing business and data services to such cities as Washington, Baltimore, Philadelphia, Wilmington, New York, Newark, Pittsburgh, Toledo, Akron, Cleveland, Detroit, South Bend, Chicago, Des Moines, Davenport, Kansas City, Iowa City, Lincoln, Minneapolis, Cedar Rapids, Omaha, St. Louis, Oklahoma City, Tulsa, Dallas, Austin, Houston, Tucson, Phoenix, Los Angeles, San Diego and San Francisco.

On October 4, 1973, AT&T attempted to delay competition by filing a Petition in which it requested that the Commission defer, during the pendency of a newly requested hearing, the granting of any further specialized carrier applications. The Commission denied AT&T's moratorium

petition on December 12, 1973. *Commission Policies Governing the Licensing and Regulation of Specialized Common Carriers,* 44 FCC 2d 467. The Commission observed that "AT&T's petition is in effect a request that the Commission reconsider and reverse its decision in Docket 18920" (the *Specialized Carrier* proceeding) and concluded that, 44 FCC 2d at 471:

> The facts as we know them, including the showing made by AT&T in its petition, do not support the contention that there have been such changes in circumstances and unanticipated developments which have occurred since our decision to require such reexamination. Nor does AT&T advance any significant arguments that were not carefully and extensively considered on the basis of the record in Docket No. 18920.

The Commission denied AT&T's petition for reconsideration of this order on November 13, 1974. 50 FCC 2d 416.

The Commission has, instead, extended the scope of competition in the provision of domestic specialized communications services by authorizing the use of communications satellites. *Establishment of Domestic Communications Satellites by Non-Governmental Entities,* 35 FCC 2d 844 (1972), *aff'd sub nom. Network Project v. FCC,* 511 F.2d 786 (D.C. Cir. 1975).

Another reaffirmation of the Commission's *Specialized Carrier* policy took place when the Bell System Companies attempted to deny certain types of interconnections to MCI. In *Bell System Tariff Offerings,* 46 FCC 2d 413 (1974), the Commission issued a cease and desist order requiring Bell to provide interconnection facilities on a nondiscriminatory basis to MCI and other specialized carriers for the provision of all their authorized services. In *Bell Telephone Co. v. FCC,* 503 F.2d 1250 (3d Cir. 1974), *cert. denied,* 43 U.S.L.W. 3660

(U.S., June 16, 1975), the court upheld the Commission's ruling. The court found that the "full competition" mandate of the *Specialized Carrier* decision indicated that "the Commission intended to authorize the new carriers to provide all elements of private line services theretofore furnished by the established carriers." 503 F.2d at 1261-62. Since the court recognized the interconnection enforcement order as a reaffirmation and outgrowth of the *Specialized Carrier* decision, it necessarily and properly passed upon the merits of that decision, not only with respect to the basic policy in favor of full competition in the specialized communications field (503 F.2d at 1259-63), but also with respect to the Commission's discretion to proceed by rulemaking rather than adjudication (*id.* at 1263-68), and the appropriate weight to be given to competitive considerations in authorizing new entry in compliance with the principles of *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953) (*id.* at 1270-73). The Third Circuit thus, in effect, approved many of the rulings the Commission made in the *Specialized Carrier* decision, and which are under review here. This Court denied certiorari in the matter on June 16, 1975. 43 U.S.L.W. 3660.

Far less directly related to the Commission's *Specialized Carrier* decision is another subsequent proceeding discussed in NARUC's petition, Docket No. 20003. This proceeding is a fact finding inquiry entitled *Economic Implications of Interrelationships Arising From Policies and Practices Relating to Customer Interconnection, Jurisdictional Separations and Rate Structures*, 46 FCC 2d 214 (1974). As this title suggests, the inquiry is directed to studying the economic interrelations of a wide assortment of regulatory practices. In its Notice of Inquiry, the Commission was careful "to make clear that this is primarily a fact-finding inquiry and that we are not proposing in this particular proceeding to adopt any rules or policies, as such." 46 FCC 2d at 214-15; *see* 49 FCC 2d 1238-39 (1974).

ARGUMENT

I. The Decision Below Is Not In Conflict With This Court's Ruling In *FPC v. Texaco, Inc.*, 417 U.S. 380 (1974).

NARUC is in error in asserting that there is a conflict between the FCC's decision below and this Court's ruling in *FPC v. Texaco, Inc.*, 417 U.S. 380 (1974). The *Texaco* case has little, if any, relevance to the instant case. In the *Texaco* case, this Court dealt not with the question of market entry, which was addressed in the FCC's decision below, but rather with the question of regulating the rates of organizations that had already been permitted to compete in the regulated industry. The FCC decision, on the contrary, had nothing to do with regulation of rates. The question of market entry, which is the one that is relevant here, was addressed by this Court last year in *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974). In that case the Court reached a result in favor of market entry which is similar to the one reached by the Ninth Circuit here. This Court stated, in *Bowman*, that an agency "could conclude that the benefits of competitive service to consumers might outweigh the discomforts existing certificated carriers *could* feel as a result of new entry." 419 U.S. at 298 (emphasis added).

It should be noted that, in *Texaco*, the Court proceeded on the basis that rate regulation was required by Congress because of "anticompetitive conditions in the industry." 417 U.S. at 399. In the present case, it is NARUC that wishes to impose, by administrative decree, the ultimate anticompetitive condition possible in an industry—administrative proscription of any new market entry.

NARUC asserts (pp. 17-18) that the FCC violated some "congressional assumptions embedded into the framework of regulation established by the Act," but never says just what "assumptions" it is referring to, or does not provide any basis

at all for its claim that such "assumptions" are embedded in the Communications Act. Quite to the contrary, the court below concluded that (Pet. App. 25a):

> The Supreme Court's disposition of *RCA Communications* is flatly inconsistent with NARUC's contention that new entry is impermissible if it will result in duplication of facilities of existing carriers capable of furnishing the service.

NARUC says nothing in its Petition for Writ of Certiorari which detracts in any way from the soundness of this conclusion—which holds that there are no "assumptions" in the Communications Act which foreclose competition. That holding is wholly consistent with this Court's decision in the *Bowman* case, *supra*, and also with the decision in *Bell Telephone Co. v. FCC, supra.*[3]

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[3]At page 18 of its petition, NARUC suddenly shifts from a discussion of the FCC's authorization of additional entry into the market (Issue A below) to a quotation (at Pet. App. 159a-160a) from the FCC's treatment of Issue B below, which involved the wholly separate question: "Whether comparative hearings on the various claims of economic exclusivity among the applicants are necessary or desirable in the circumstances." NARUC objects to the Commission's statement that, if the various applicants are found to be qualified and obtain the necessary resources, it deemed "the marketplace to be a more reliable and effective instrument than the comparative hearing process for determining how many and which new entrants may succeed." It is significant that none of the applicants involved, nor any of the previously established carriers for that matter, contested the Commission's decision not to conduct comparative hearings on claims of economic exclusivity among the applicants. NARUC does not advance any specific reasons here why the Commission should have reached a contrary result. The Ninth Circuit summarized the complete list of reasons the Commission gave for not holding comparative hearings in footnote 33 of its decision (Pet. App. 38a-39a) and concluded that they

NARUC also attempts by going outside the record—to downgrade the Commission's processing of specialized common carrier applications in the wake of the 1970 *Specialized Carrier* decision as merely "ministerial" (Footnote 23, pp. 18-19). This is not factually correct. As mentioned above, the Commission took several years after its *Specialized Carrier* decision to process these applications. In each case the FCC made certain that the applicant had complied with the detailed provisions of Part 21 of the Commission's Rules (47 CFR Part 21) and had established its legal, financial and technical qualifications to operate the proposed facilities. This scarcely represented the abandonment of regulation which NARUC suggests in its instant petition.

II. There Is No Need To Decide Whether A Reviewing Court Should Consider Subsequent Inconsistent Agency Action Because The FCC Has Not Acted Inconsistently.

As a second reason for granting the writ, NARUC asks whether "a reviewing court must blind itself to subsequent agency action that is fundamentally inconsistent with its posture before the court in the decision under review" (Petition, p. 19). That question, however, is simply not relevant to this case. In point of fact, there has been no subsequent agency action that is inconsistent with the *Specialized Carrier* decision.

"reflect a careful consideration of the relevant factors and a reasoned exercise of the Commission's discretion" (Pet. App. 38a-39a). NARUC has advanced no reason to overturn this conclusion of the Ninth Circuit. It apparently quotes the passage set forth at page 18 of its brief simply because it praises the marketplace as a substitute for regulation of the number of new entrants to be admitted into the communications field, while this Court, in the *Texaco* case, said that the marketplace was not the final measure of the reasonableness of rates, and that the FPC could not wholly abandon the regulation of such rates. In short, NARUC quotes the FCC out of context—and then tries to compare apples and oranges.

The FCC has implemented its *Specialized Carrier* decision by granting numerous individual specialized common carrier applications. It has extended the reach of its policy of encouraging new competitive entry into the field of specialized communications by authorizing the use of communications satellites by new entrants.[4] It has *twice* rejected attempts by AT&T to impose a moratorium upon the grant of additional specialized carrier applications.[5] It has emphatically blocked the attempt by AT&T to undermine the *Specialized Carrier* policy by refusing interconnections required by the new carriers to provide their authorized services.[6] All of these actions are fully consistent with, and in pursuance of, the Commission's *Specialized Carrier* decision.

NARUC bases its claim that the FCC has acted inconsistently upon the agency's institution of a fact finding inquiry in Docket No. 20003, *Economic Implications and Interrelationships Arising From Policies and Practices Relating to Customer Interconnection, Jurisdictional Separations and Rate Structures,* 46 FCC 2d 214 (1974). The relative importance of the implications of specialized carrier competition to the inquiry, it will be noted, was so small that it was not even mentioned in the rather lengthy title given the inquiry. The Commission has made it abundantly clear that Docket No. 20003 is simply a fact finding inquiry and that it therefore does not envision the adoption of any rules or

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[4] *Establishment of Domestic Communications Satellites by Non-Governmental Entities,* 35 FCC 2d 844 (1972), *aff'd sub nom. Network Project v. FCC,* 511 F.2d 786 (D.C. Cir. 1975).

[5] *Commission Policies Governing the Licensing and Regulation of Specialized Common Carriers,* 44 FCC 2d 467 (1973), *reconsideration denied,* 50 FCC 2d 416 (1974).

[6] *Bell System Tariff Offerings,* 46 FCC 2d 413, *aff'd, Bell Telephone Co. v. FCC,* 503 F.2d 1250 (3d Cir. 1974), *cert. denied,* 43 U.S.L.W. 3660 (U.S., June 16, 1975).

policies as a result of the proceeding. *Economic Implications*, 46 FCC 2d 214 (1974), 49 FCC 2d 1238 (1974). The inquiry addresses a wide assortment of regulatory policies and practices spanning the entire field of common carrier communications—including the question whether the state regulatory commissions which make up NARUC should have required the telephone industry to charge for local exchange service on the basis of usage of the exchange plant, rather than on a flat rate basis. The fact that the Commission wishes to obtain economic data concerning these matters does not imply any prejudgment as to the soundness or unsoundness of the policies and practices in question. It is simply an example of the Commission's general surveillance of the industry and reflects its efforts to review periodically the results of its policies and the industry's practices.

While the scope of Docket No. 20003 touches upon almost every facet of the common carrier industry (*see* First Supplemental Notice, released December 17, 1974, 50 FCC 2d 574), there is not even a suggestion that the Commission is contemplating abandonment of its policy in favor of competition in the specialized communications field or questions its specific finding in the *Specialized Carrier* decision that new entry in that field will have little, if any, adverse economic impact on telephone users. (*See* Pet. App. 130a-138a, 142a-148a). Thus, there is no basis for NARUC's claim that the Docket No. 20003 inquiry and the *Specialized Carrier* decision are "fundamentally inconsistent."

If, however, it is assumed, for the sake of argument, that the institution of Docket No. 20003 in any manner implies that the Commission is reconsidering some part of the basis of its *Specialized Carrier* decision, then the Court has additional reason to deny the writ, since such reconsideration by the agency would render unnecessary the Court's review of the *Specialized Carrier* decision.

It is well settled that: "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *SEC v. Chenery*, 318 U.S. 80, 87 (1943). The Ninth Circuit has reviewed the grounds upon which the Commission's disposition was made and found those grounds reasonable (Pet. App. 27a). NARUC's attempt, past the eleventh hour, to introduce extraneous and suppositious matter not before the agency when it acted should not be permitted to forestall the prompt and orderly termination of these proceedings.

III. The Fact That The FCC Did Not Issue An Environmental Impact Statement In Its Rule Making Does Not Require Review Of Its Decision.

The proceeding below was a rulemaking proceeding to resolve certain carefully delineated policy issues common to a large number of individual specialized common carrier applications. The Commission gave all interested parties the opportunity to suggest additional questions for consideration in the proceeding and allowed them to make a full presentation of fact and argument in support of their positions. *Specialized Common Carrier Services*, 24 FCC 2d 318 (1970). Despite that opportunity, neither NARUC nor any of the nearly 200 parties that participated in the proceeding made the slightest suggestion that there were any environmental implications in the proposed policies the Commission was considering.

NARUC raised environmental questions for the first time on appeal to the Ninth Circuit. Until that time, no one had ever raised environmental questions with respect to the grant of authority to construct any of the thousands of microwave towers that were then being operated by AT&T, by other established common carriers, by numerous licenseees in the FCC's Safety and Special Services, or by Community Antenna Relay Station operators licensed pursuant to Part 74 of the Commission's Rules (47 CFR Part 74).

The Ninth Circuit concluded that the circumstances of this case necessitated that a "balance should be struck against possible review and reversal of this Commission order on the ground NARUC seeks to raise for the first time in this court" (Pet. App. 40a-41a). The court was careful to point out that it did "not mean to imply that an environmental impact statement would have been required had the issue been raised before the Commission."

The court concluded that any "damage that might be done to NEPA interests by failure to review the NEPA questions now is problematic and, in any event, slight" (Pet. App. 41a). The court also pointed out that there was "no apparent obstacle to NARUC presenting its position on the environmental issue to the Commission in a proceeding on one or more of the individual applications" (*id.*). But NARUC never chose to raise an environmental objection to any specific microwave facility proposed by a specialized carrier—or for that matter by any other microwave applicant in the categories listed above. Clearly, it could have sought a hearing on environmental impact in connection with any application. The briefs filed with the Court of Appeals by the FCC and by MCI pointed out that such an opportunity was available to NARUC. The FCC reviewed each such application and did not find a need to designate formal hearings on any of them with respect to environmental questions.

After issuance of its *Specialized Carrier* decision, the FCC developed and issued rules on the handling of environmental questions in connection with its activities generally. *Implementation of the National Environmental Policy Act of 1969*, 49 FCC 2d 1313 (1974). NARUC has neither petitioned for reconsideration nor sought judicial review of this comprehensive environmental rule making.

The court below made the statement, which is quoted at page 24 of NARUC's instant petition, in the context of suggesting that NARUC had a better alternative, in seeking to

assert its alleged environmental concerns. Instead of appealing the *Specialized Carrier* rulemaking decision, NARUC should have sought a hearing on the environmental issue in connection with one or more of the individual facility applications. It is true that the FCC did not hold evidentiary hearings on the individual applications. But it reviewed these applications and passed upon them in a careful manner that met all the requirements of law, thus providing an administrative hearing process that could have effectively accommodated NARUC's environmental concerns. NARUC could, indeed, have secured *evidentiary* hearings on individual applications if it had met the requirements of Section 309 of the Communications Act (47 U.S.C. §309) by showing that "a substantial and material issue of fact is presented" as to environmental questions. It did not even try to do so, which must raise a question as to the sincerity of its concern for the environment—except as a basis for attacking the Commission's policy favoring new competition. As the court's discussion (Pet. App. 29a-35a) makes clear, there is a substantial difference between the "hearing" that the law requires in many situations and an "evidentiary hearing" which may be required in other cases. The court's subsequent reference to separate hearings on each application (Pet. App. 41a) did not mean that an *evidentiary* hearing was required in each case, but only that the Commission had to pass separately on the merits of each application with respect to matters not already covered by the hearing in the *Specialized Carrier* proceeding—including any environmental issues that might have been raised by NARUC or others.

Any consideration of the applicability of the National Environmental Policy Act of 1969 to the communications industry which considered the environmental implications of just one limited subgroup of applicants would have been irrational. Specialized carriers account for only a small percentage of the microwave towers used for communications purposes—and microwave towers represent just a fraction of all the radiation emitting towers authorized by the FCC.

Instead, the Commission systematically developed procedures for the consideration of possible environmental questions with respect to *all* its licensees. Since there had been almost no history of expressions of environmental concern with respect to communications facilities, the Commission's task was a complex, but not really an urgent, one. The Commission adopted a Report and Order on September 26, 1974 which provides for uniform treatment of any environmental questions that may develop with respect to any of the numerous kinds of licensees with whom the Commission deals. *Implementation of the National Environmental Policy Act of 1969*, 49 FCC 2d 1313 (1974).

In its petition, NARUC seizes upon the Commission's use of the term "major actions" in connection with certain microwave towers to construct the inference that the facilities of the specialized carriers are, by definition, now recognized as having a significant environmental impact. In Section 1.1305 of its Rules, 47 CFR §1.1305, the Commission uses the term "major actions" to encompass the construction of a variety of communications facilities. These are the facilities for which the Commission, in 47 CFR §1.1311, requires the submission of environmental information. Any proposed construction that is not classified as "major" does not even require the submission of environmental data. *See* 49 FCC 2d at 1319. The categorization of microwave towers of a certain height as "major" facilities thus represents simply the definition of a threshold for environmental consideration. It will be noted that all microwave towers are treated alike, regardless of whether they happen to be used by the Bell System or by specialized carriers or by anyone else. The decision as to whether environmental statements are to be required in rule making is left to a case-by-case determination. As the FCC stated in its environmental Report and Order, "communications is a clean industry." 49 FCC 2d at 1327. The Commission has nevertheless taken care to implement the requirements of NEPA in the communications industry—though it admittedly did not do so until after its

Specialized Carrier decision.

Clearly, NARUC had ample opportunity to raise any environmental considerations it thought relevant, either during its two rounds of comments in the *Specialized Carrier* proceeding, or in its oral argument before the Commission, or in its petition for reconsideration of the *Specialized Carrier* decision, or in either formal petitions or informal comments with respect to individual specialized carrier facility applications.

In this proceeding, NARUC has attempted to misuse NEPA, trying to twist it to serve as a hunting license against agency action that has met its displeasure for reasons having nothing whatsoever to do with the environment. The basic lack of genuine interest in the environment is underlined by the fact that, while NARUC made no environmental objections with respect to any individual facilities, it is now attempting to reopen this proceeding even though the facilities that ultimately resulted from the Commission's action have already been constructed and are providing service to the public without any environmental problems.

No good purpose would be served by granting the writ sought by NARUC.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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July 29, 1975

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1550

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-46a) is reported at 513 F.2d 1142. The first report and order of the Federal Communications Commission (Pet. App. 48a-188a) is reported at 29 F.C.C. 2d 870. The memorandum opinion and order of the Commission denying reconsideration (Pet. App. 189a-194a) is reported at 31 F.C.C. 2d 1106.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1975. A petition for rehearing was denied on March 11, 1975 (Pet. App. 47a). The petition for a writ of certiorari was filed on June 9, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission properly adopted a policy favoring the entry of new specialized communications carriers.

2. Whether the Commission's initiation of an Economic Inquiry (concerning customer interconnection services) precludes it from adhering to its ruling in this case.

3. Whether the court of appeals correctly exercised its discretion, in light of the particular circumstances of this case, not to review petitioner's assertion that the Commission did not comply with the National Environmental Policy Act.

STATUTES INVOLVED

Relevant sections of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*, are set forth at Pet App. 195a-209a. Section 405 of the Communications Act (47 U.S.C. 405) is reproduced in the Appendix to this brief.

STATEMENT

Communications companies in the United States provide both public and private lines. Private line service, which is involved in this case, usually is sold to large users of communications. Until 1969 most interstate private line service had been provided by American Telephone & Telegraph Co. (AT&T) (Pet. App. 136a, n. 36).

In 1969, after a hearing lasting several years, the Commission authorized Microwave Communications, Inc., to provide point-to-point private line services between Chicago and St. Louis. *Microwave Communications, Inc.*, 18 F.C.C. 2d 953. The Commission's decision to grant this private line application led to an influx of applications for authority to provide a variety of inter-

state private line services: approximately 40 applications were filed, collectively seeking more than 1,700 licenses to operate microwave communications facilities. The applications raised many issues in common, and the Commission initiated a general rulemaking proceeding (Docket 18920) to explore them. Interested parties were invited to comment on the question whether additional competition for private line service would serve the public interest.

After lengthy proceedings[1] the Commission concluded that the private line service offered by existing carriers had not been sufficiently diversified or flexible, although such service was needed to meet the nation's growing and varied communications requirements (Pet. App. 121a-130a). The Commission also found that new entrants could reasonably be expected to innovate, enlarge markets, and better serve particularized customer needs (Pet. App. 127a-130a). The Commission recognized that competition and new entrants might not be an unmixed blessing; it analyzed the impact of new entrants upon the existing carriers and it determined that, in light of the projected rate of growth of basic services to be provided by AT&T and the likelihood that AT&T would retain a sizeable portion of the specialized services market, a liberalized entry policy would not significantly harm it (Pet. App. 130a-134a). Accordingly, the Commission concluded that a general policy in favor of the entry of new specialized communications carriers was in the public interest (Pet. App. 148a).

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[1]More than 200 parties participated in Docket 18920, building a record exceeding 4,000 pages of pleadings, exhibits and transcripts.

Petitioner sought reconsideration of the Commission's order. The Commission reaffirmed that "there is substantial evidence of a rapidly growing market for new and diversified communication services to meet the changing and expanding communications requirements of the public" (Pet. App. 191a) and that "any potential adverse effects of such new entry on the existing carriers and their customers would be minimal, if any at all" (*id.* at 192a).

On petition for review, the court of appeals unanimously affirmed the Commission. The court held that the Commission acted within its authority in adopting by rulemaking a general policy favoring entry of new carriers (Pet. App. 28a). It ruled that the Commission's decision was a conscientious application of the principles set forth by this Court in *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86 (Pet. App. 25a). Finally, the court declined to review petitioner's claim (not raised before the agency) that the Commission had neglected its duties under the National Environmental Policy Act (Pet. App. 40a-41a).

ARGUMENT

The decision of the court of appeals is correct. It represents only the application to the facts of this case of legal questions settled by *RCA Communications*. There is no conflict among the circuits, or with any decision of this Court, and there is no reason for further review.[2]

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[2]This Court has denied certiorari in a case involving a collateral attack on the Commission's decision involved here. *American Telephone and Telegraph Co.* v. *Federal Communications Commission*, No. 74-1229, decided June 16, 1975. The petitioner in that case has requested a rehearing based upon the pendency of the petition for certiorari in this case, claiming that certain issues are common to both cases. While both cases grow out of the same Commission order, the legal issues in this case are distinct from those in No. 74-1229.

1. The Commission has adopted a policy allowing relatively (although not completely) free entry into the business of providing certain specialized communications services over microwave facilities. Nothing in the Communications Act requires a contrary result. Congress has instructed the Commission to allow new service if it will serve the "public interest, convenience, and necessity." See 47 U.S.C. 309(a) and 214(a). In *RCA Communications* this Court held that the benefits produced by increased competition could satisfy the statutory standard and justify new entry, provided that the Commission "at least warrant, as it were, that competition would serve some beneficial purpose." 346 U.S. at 97. The Commission here has carefully articulated both the feasibility of competition and the specific benefits reasonably to be expected from its new policy (Pet. App. 122a-130a). It has balanced these benefits against the foreseeable costs. As the court of appeals held, this appraisal "sought conscientiously to follow" the guidelines established by this Court (Pet. App. 25a).

Petitioner does not contend that the Commission has failed to meet the standards of *RCA Communications*. Petitioner asserts instead that the Commission's decision is contrary to *Federal Power Commission* v. *Texaco, Inc.*, 417 U.S. 380. But *Texaco*, which dealt with two rate regulation provisions of the Natural Gas Act (15 U.S.C. 717c and d), has nothing to do with policies regarding entry into a business—and certainly not one under a different statute with different language and a different legislative history. *Texaco* does not mention, let alone call into question, the decision in *RCA Communications*.

It is true, as petitioner emphasizes, that in *Texaco* the Court noted that Congress was concerned that concentrated ownership of natural gas pipelines and production facilities had distorted market forces and did not want

market-place prices to be the final measure of "just and reasonable" natural gas rates (417 U.S. at 398). However, to the extent this dictum is relevant at all to the Federal Communications Commission's decision to allow new entrants in private line communications, it supports the Commission's decision: it points to the dangers of excessive concentration, which the Commission's new entry policy works to diminish.

2. Petitioner's contention that subsequent Commission action is "diametrically at odds" with its decision here (Pet. 22), and that the difference should have led the court of appeals to a different conclusion, is inaccurate. The present decision, like several others made since 1968,[3] opened certain segments of the telecommunications market to competition. When making such decisions the Commission necessarily relied on a measure of expert prediction of results and an informed judgment of their costs and benefits. *RCA Communications, Inc., supra,* 346 U.S. at 96-97. The ultimate test of any prediction, however, is experience. The Commission seeks to profit from experience, and periodically attempts to assess the effects of its decisions and reevaluate its policies. And so here: in 1974, in order to determine the actual impact of its several decisions involving competition in telecommunications, the Commission opened a general inquiry. *Economic Inquiry,* 46 F.C.C. 2d 214 (Docket 20003). One of the issues to be examined in Docket 20003 is the claim of petitioner, made in Docket 18920 and renewed by it in Docket 20003, that competition in specialized interstate services will lead to higher local telephone rates. *First Supplemental Notice,* Docket 20003, at pp. 2, A-1 (December 5, 1974). However, the Commission's interest in this issue, like its interest in the numerous other issues to be explored in Docket

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[3] See, *e.g., Carterfone,* 13 F.C.C. 2d 420, reconsideration denied, 14 F.C.C. 2d 571; *Domestic Communications-Satellites Facilities,* 35 F.C.C. 2d 844.

20003, does not represent a repudiation of its past policy or acceptance of petitioner's assertions. It is simply a "fact-finding inquiry" in which the Commission is "not proposing * * * to adopt any rules or policies, as such." *Economic Inquiry*, 46 F.C.C. 2d 214-215. It is part of the continuing process by which the Commission broadens its experience and knowledge; its existence is not a ground upon which to attack the Commission's prior decisions. Cf. *Far East Conference* v. *United States*, 342 U.S. 570, 575.

3. Petitioner's argument (Pet. 23) that the court of appeals abused its discretion by failing to review the National Environmental Policy Act ("NEPA")[4] issues raised by it for the first time before that court is unpersuasive. Petitioner admits that neither it nor any other party raised NEPA issues before the Commission, and it recognizes that in these circumstances the court of appeals had discretion not to hear the belated claim (Pet. 23-24). The court did not abuse its discretion; it recognized the importance of NEPA (Pet. App. 40a) but it also recognized (*ibid.*) that "NEPA was not intended to repeal by implication any other statute" (*United States* v. *SCRAP*, 412 U.S. 669, 694), including statutes requiring parties to raise claims before administrative agencies in the first instance. Section 405 of the Communications Act, 47 U.S.C. 405 (Appendix, *infra*) codifies the fundamental administrative law doctrine of exhaustion of administrative remedies. *Neckritz* v. *Federal Communications Commission*, 446 F.2d 501 (C.A. 9).

The court's handling of this matter reveals sensitivity to the values of each statute. The court made it clear that NEPA would apply to the Commission's authorization of construction of private line facilities not just individually, but "as a whole, and in full

[4] 42 U.S.C. 4321 *et seq.*

context" (Pet. App. 41a). But it noted that, since the Commission's report did not authorize the construction of any specific facilities, petitioner could present its environmental claims when the Commission ruled on actual applications (*ibid.*).[5] The court also examined petitioner's claim of environmental impact from the report and found the claim unpersuasive, for "[t]he immediate effect of the order is upon who will furnish the service, not whether it will be furnished, or how much" (*ibid.*).

Although there was thus little to be gained by reviewing the NEPA issue, there was much to be lost by doing so. Because the NEPA issue had not been raised before the Commission, the court lacked the benefit of the Commission's views on the applicability of NEPA "in the peculiar substantive and procedural posture of this matter" (Pet. App. 42a).[6] See *Aberdeen & Rockfish Ry.* v. *SCRAP*, No. 73-1966, decided June

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[5]Petitioner claims that the Commission subsequently granted numerous applications without considering environmental impact (Pet. 24). However, petitioner does not deny that it was aware of those applications and that it had the right, which it chose not to use, to raise any pertinent environmental objections (Pet. App. 225a-226a). Under the Commission's environmental impact regulations, which have been in effect since January 1975, the Commission will on its own initiative examine the environmental impact of the construction of the type of microwave relay antenna towers used in private line service. See 47 C.F.R. 1.305(a)(2), 39 Fed. Reg. 43844.

[6]Although petitioner asserts that under the Commission's environmental rules "there can be little doubt" that the Commission would consider environmental impact in adopting a report like the present one (Pet. 25), the matter is far from clear. See 39 Fed. Reg. 43836. As the court of appeals pointed out, the Commission's decision here had little, if any, environmental effect because it prescribed neither the number nor the location of any communications facilities.

24, 1975, slip op. 28-33. To resolve the issue now not only would entail "great delay, waste, and expense" (Pet. App. 42a), but also would create a "potential for abuse" by encouraging parties disappointed by agency action to reserve NEPA issues for the reviewing court as a dilatory tactic (*ibid.*). The court's balancing of values was a reasonable exercise of its discretion.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1975.

APPENDIX

Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. 405, provides:

> After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(d) (1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(d)(1) of this title, in its discretion, to grant such a rehearing if sufficient reason therefor be made to appear. A petition for rehearing must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying

a petition for rehearing or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided,* That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Rehearings shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any hearing. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which public notice is given of orders disposing of all petitions for rehearing filed with the Commission in such proceeding or case, but any order, decision, report, or action made or taken after such rehearing reversing, changing, or modifying the original order shall be subject to the same provisions with respect to rehearing as an original order.